IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1720

JOHN M. DALEY,

Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	4
Reasons for Granting the Writ	8
1. The Decision of the Court of Appeals for the Seventh Circuit, That a Disbarment Proceeding Is Not One for "Penalty" or "Forfeiture" Within the Meaning of the Fifth Amendment's Self-Incrimination Clause, Is Inconsistent with the Judgments of This Court and of Another United States Court of Appeals	8
2. The Judgment Below, That a Federal Court Lacks Authority to Protect the Integrity of Its Own Processes by Barring the Use by Others of Testimony Compelled by It, Is Also Inconsistent with the Judgments of This Court and Those of Other Courts of Appeals	12
3. The Court of Appeals, by Precluding the Trial Court from Meeting Its Commitments to Petitioner, Made on the Representations of Both the United States and the Trial Court to the Petitioner, to Prevent Use of Compelled Testimony in Disbarment Proceedings, Has Violated the Due Process Clause of the Fifth Amendment Under the Constructions of Due Process Announced by This Court	14
Conclusion	15
Appendices	A1
Appendix A (Opinion of the United States Court of Appeals for the Seventh Circuit, February 11, 1977)	A1

Appendix B (Order of the United States District Court for the Northern District of Illinois, July 18, 1974) A26
Appendix C (Order of the United States District Court for the Northern District of Illinois, May 28, 1976) A28
Appendix D (Order of the United States Court of Appeals for the Seventh Circuit, March 28, 1977) A32
Appendix E (Exhibits Before the United States District Court for the Northern District of Illinois) A33
Index to Appendix E A33

Table of Authorities Cited.

Cases.

Adams v. Maryland, 347 U. S. 179 (1954) 9
Adams v. United States ex rel. McCann, 317 U. S. 269 (1942) 12
Boyd v. United States, 116 U. S. 616 (1886) 8
Bradley v. Fisher, 13 Wall. 335 (1872) 11
Cohen v. Hurley, 366 U. S. 117 (1961) 10
Counselman v. Hitchcock, 142 U. S. 547 (1892) 8
Cox v. Louisiana, 379 U. S. 559 (1965) 14
In re Daley, 549 F. 2d 469 (7th Cir. 1977) ..... *passim*
Erdmann v. Stevens, 458 F. 2d 1205 (2d Cir. 1972) 11
Ex parte Garland, 4 Wall. 333 (1867) 10
Garrity v. New Jersey, 385 U. S. 493 (1967) 11
Griffin v. California, 380 U. S. 609 (1965) 10
Gumbel v. Pitkin, 124 U. S. 131 (1888) 13
Johnson v. United States, 318 U. S. 189 (1913) 14
Kastigar v. United States, 406 U. S. 441 (1972) 8, 9
Monia v. United States, 317 U. S. 424 (1942) 9
Murphy v. Waterfront Commission, 378 U. S. 52 (1964) 6
Raley v. Ohio, 360 U. S. 423 (1959) 14
Rea v. United States, 350 U. S. 214 (1956) 13
In re Ruffalo, 390 U. S. 544 (1968) 10, 11
Slochower v. Board of Education, 350 U. S. 551 (1956) .. 10
Sperry Rand Corp. v. Rothlein, 288 F. 2d 245 (2d Cir. 1961) 13
Spevack v. Klein, 385 U. S. 551 (1967) 10, 11

United States v. Bonk, 75-CR-88 (N. D. Ill., June 6, 1975) 6
United States v. United Fruit Co., 410 F. 2d 553 (5th Cir. 1969) 13
Younger v. Harris, 401 U. S. 37 (1971) 11

Constitutional and Statutory Provisions.

United States Constitution, Article VI 2, 3
United States Constitution, Amendment IV 8
United States Constitution, Amendment V ..... *passim*
United States Constitution, Amendment XIV 3
18 U. S. C. § 6002 ..... *passim*
28 U. S. C. § 1254 2
28 U. S. C. § 1651 ..... 3, 12

Other Materials.

Hearings on S. 30 Before the Subcommittee on Criminal Laws and Procedures of the United States Senate Commitee on the Judiciary, 91st Cong., 1st Sess. (1969) . . . 9, 10

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, John M. Daley, respectfully prays that a writ of certiorari be issued to review the decision in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW.

The opinion of the United States Court of Appeals is reported as *In re Daley*, 549 F. 2d 469 (7th Cir. 1977), and is set forth herein as Appendix A. The unpublished order entered by the United States District Court for the Northern District of Illinois on July 18, 1974, is set forth herein as Appendix B. The un-

published order entered by the United States District Court for the Northern District of Illinois on May 28, 1976, is set forth herein as Appendix C.

JURISDICTION.

The Court of Appeals entered its judgment on February 11, 1977. Petitioner's timely petition to that court for a rehearing and for a rehearing *en banc* was denied on March 28, 1977. The unpublished order denying the petition for rehearing is set forth herein as Appendix D.

This Court has jurisdiction of this cause under 28 U. S. C. § 1254.

QUESTIONS PRESENTED.

1. Is a state disbarment proceeding one to impose a "penalty" or "forfeiture" within the meaning of the Fifth Amendment's privilege against self-incrimination?

2. Does a federal district court have power to bar use of testimony in a state bar disciplinary proceeding, where the barred testimony was secured by destruction of the witness's constitutional right against self-incrimination and with an express judicial commitment by the federal court that the witness's testimony could not be used against him in state bar disciplinary proceedings?

3. Is a federal court foreclosed by the Fifth Amendment's Due Process Clause from reneging on a commitment to protect a witness against the use of his compelled testimony in state bar disciplinary proceedings?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Article VI of the United States Constitution provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 6002 of the Immunity Act, 18 U. S. C. §§ 6001 *et seq.*, provides in pertinent part:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States, . . . and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

The All Writs Act, 28 U. S. C. § 1651, provides in pertinent part:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT.

This is an action in which the Petitioner, John M. Daley, seeks to enforce the terms of an immunity order under which he was deprived of his constitutional privilege against self-incrimination and was compelled to testify in a federal criminal case. He seeks to deny the use of his extracted testimony in a state proceeding seeking the forfeiture of his license to practice law. The facts are not in dispute.

In early 1974, a special grand jury was empaneled by the United States District Court for the Northern District of Illinois. Its inquiry ultimately culminated in the indictment and trial on charges of extortion of a member of the Cook County Board of Commissioners, Charles Bonk. In May of that year, James R. Thompson, the United States Attorney, determined that "the testimony of JOHN DALEY in regard to the above-described investigation before the said grand jury is necessary to the public interest. . . ." Exhibit D.* Mr. Daley was described in the indictment as one of the victims of the alleged extortion. He was thereupon served with a subpoena commanding him to appear and to give his evidence before the grand jury.

Mr. Daley, a lawyer licensed by the State of Illinois, retained counsel, and through his attorney advised Mr. Thompson that he would refuse to testify. In so doing, Mr. Daley expressly invoked his right to remain silent under the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution. Exhibit B. The United States Attorney then resolved to seek to compel the testimony under the Immunity Act, 18 U. S. C. §§ 6001 *et seq.*, and so informed Mr. Daley.

With the approval of the proper Assistant Attorney General, Exhibit A, the United States Attorney petitioned the district

*Citations to "Exhibits" refer to the exhibits tendered below by Petitioner to the district court in support of his motion to compel compliance with the immunity order in question. The exhibits referred to herein are set forth as Appendix E to this petition.

court for a grant of immunity to Petitioner. Exhibit D. Mr. Thompson's First Assistant stated, by affidavit, that he had informed Petitioner's lawyer that "the United States Attorney's Office was concerned because of prior incidents that efforts might be made to pressure the witness Daley by threats of administrative action into not testifying or to testifying falsely." Exhibit B. Although Mr. Thompson and his aides communicated to Petitioner their opinion that "Section 6002, Title 18 would in any event prohibit the use of immunized testimony in bar disciplinary proceedings," they stated that, "to insure the integrity of the testimony," they would seek to include in the immunity order a specific provision "prohibiting the use of the testimony so obtained in administrative proceedings involving bar disciplinary action." *Ibid.*

A proposed order was submitted by the United States Attorney to Chief Judge Robson and explanation was made to him of the reason for the inclusion of the special provision. On July 18, 1974, Chief Judge Robson entered the immunity order, Exhibit E, which directed Petitioner to testify, and which also provided:

> . . . IT IS FURTHER ORDERED that no testimony of the witness, John Daley, compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against him in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order, in accordance with the provisions of Section 6002, Title 18, United States Code.
>
> IT IS FURTHER ORDERED that no testimony of the witness, John Daley, compelled under this order as above, may be used against him in any administrative proceeding, disciplinary committee, any bar association or state Supreme Court, in conjunction with any professional disciplinary proceeding or disbarment.

In obedience to the command of the United States District Court, and in reliance upon the representations, made personally

to Mr. Daley as well as through his counsel, by both the District Court and the United States Attorney about the scope of the immunity, Petitioner gave the testimony compelled from him by the immunity order. He was called as a witness before the grand jury and at the subsequent trial of Charles Bonk. *United States* v. *Bonk*, No. 75-CR-88 (N. D. Ill., June 6, 1975). In substance, Mr. Daley testified that he had been the victim, or had been a conduit from the victims, of Charles Bonk's extortion schemes.

Thereafter, on July 29, 1975, Petitioner was requested by the administrator of the Attorney Registration and Disciplinary Commission of the Illinois Supreme Court to send "a letter setting forth all material facts" relating to his testimony in the Bonk trial which was, the administrator wrote, evidence of "acts by you which if true would constitute unprofessional conduct." Exhibit G.

Petitioner replied through his attorney that the testimony about which the disciplinary commission had inquired "was the subject of a grant of immunity which precludes the direct or derivative use of that testimony in any disciplinary proceedings." Exhibit H. When the disciplinary commission convened an inquiry board, Petitioner's counsel moved it to exclude the "direct and derivative use" of the immunized testimony. Exhibit I. At the hearing, the Commission's counsel admitted that "[w]e have no basis other than the testimony of Mr. Daley in the Bonk trial. . . ." Exhibit K, at A79. After a hearing and review of Petitioner's brief, the board denied the motion and determined to use the testimony in prosecuting its inquiry into the proposed disbarment of Mr. Daley.

At the same time, the disciplinary panel confirmed its counsel's prior admission, stating that "the only substantive matter which was before this Inquiry Board was testimony of Mr. Daley through the transcript." Exhibit L, at A83. The "tainted" evidence, *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 79, n. 18 (1964), was the only evidence upon which the disciplinary commission proposed to act.

Petitioner thereupon moved the district court for an order compelling the disciplinary commission to obey the court's prior judgment, that the testimony in question could not be used in the disbarment or other disciplinary proceeding. After a full adversary hearing, Chief Judge Parsons ruled that the testimony at issue was covered by the immunity order issued by Chief Judge Robson, that the immunity properly extended to precluding use of the testimony in the disciplinary proceedings, and that the disciplinary commission should be restrained from violating the order of the federal court entered by Chief Judge Robson. The disciplinary commission appealed that decision to the United States Court of Appeals for the Seventh Circuit.

The Court of Appeals reversed the district court. Holding that the Self-Incrimination Clause of the Fifth Amendment is not applicable to disbarment proceedings, and that the Immunity Act, being coextensive with the Self-Incrimination Clause, is likewise inapplicable to disbarment proceedings, the Court of Appeals ruled that the grant of immunity to John M. Daley exceeded the limits of statutory authorization. Although the matter had been fully briefed on appeal by the parties, the court was silent as to the other inherent and statutory bases which Chief Judge Parsons had held to constitute independent authority for a federal court to issue the immunity order.

It is to this decision of the United States Court of Appeals for the Seventh Circuit that this petition for a writ of *certiorari* is directed.

REASONS FOR GRANTING THE WRIT.

I. The Decision of the Court of Appeals for the Seventh Circuit, That a Disbarment Proceeding Is Not One for "Penalty" or "Forfeiture" Within the Meaning of the Fifth Amendment's Self-Incrimination Clause, Is Inconsistent with the Judgments of This Court and of Another United States Court of Appeals.

The question raised here under the Immunity Act, 18 U. S. C. § 6002, is one that has never been submitted to this Court for its resolution. In this sense, it is novel. But this Court has heretofore decided cases that have made clear the proper resolution of the issue, a resolution in conflict with the decision by the Court of Appeals for the Seventh Circuit in this case.

This Court has held that the immunity granted by 18 U. S. C. § 6002 is and must be coextensive with the privilege against self-incrimination. *Kastigar* v. *United States*, 406 U. S. 441, 461-462 (1972). To satisfy the Constitution, the scope of the immunity grant must be at least coextensive with the scope of the privilege which is withdrawn. "Legislation cannot detract from the privilege afforded by the Constitution." *Counselman* v. *Hitchcock*, 142 U. S. 547, 565 (1892).

The Fifth Amendment protects not only against compelling evidence that may be used in a criminal case, but also against compelling such evidence in cases of "penalties" or "forfeitures." *Boyd* v. *United States*, 116 U. S. 616, 634 (1886): "As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reasons of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself."

The failure of § 6002 to make specific provision for protection against use of compelled testimony in actions for "penalties" or

"forfeitures" did not purport to, nor could it, diminish the constitutional protection. The legislative history to which this Court referred in *Kastigar, supra*, 406 U. S. at 461, makes clear that the omission of the "penalty" or "forfeiture" language was intended to leave to the courts the continued explication of the scope of the constitutional privilege. *Hearings on S. 30 before the Subcommittee on Criminal Laws and Procedures of the United States Senate Committee on the Judiciary*, 91st Cong., 1st Sess. 299 (1969):

> The meaning of the "penalty or forfeiture" phrase in all current federal immunity statutes has seldom been litigated. Two issues rather than one derived from this phrase. The first issue is the question of what kinds of penalties or forfeitures justify invoking the self-incrimination privilege. The second issue is the question of the kinds of penalties and forfeitures which a statutory immunity, once acquired, safeguards against.
>
> Under a rigid exchange theory, the scope of the "penalty or forfeiture" concept under the constitutional privilege would also dictate its scope for the purpose of defining the range of protection gained under an immunity grant. This conclusion may not always follow, however, because *Adams* v. *Maryland*, 347 U. S. 179 (1954), indicates that Congress does have power to make the statutory immunity broader than the constitutional privilege, and also because *Monia* v. *United States*, 317 U. S. 424 (1942), indicates that uncertainties in the meaning of immunity statutes should be resolved in favor of the witness. . . .
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> * * * * *
>
> In short, because the phrase "penalty or forfeiture" does not appear in the Fifth Amendment, there is no need to incorporate it in immunity statutes. Incorporation of the phrase may lead to unneeded "gratuities," i.e., the granting of an excessive pardon in the process of overcoming a plea of self-incrimination. It would seem to be sufficient for an immunity statute to be worded, as is the Fifth Amendment itself, in terms of protection against "incriminatory" consequences of compelled disclosures, and to let the scope

of this concept develop judicially in the process of interpreting the meaning of the Fifth Amendment.

This Court has made it abundantly clear that proceedings for discipline or disbarment of a lawyer do, indeed, fall within the Fifth Amendment's concept of proceedings for "penalty" or "forfeiture." And it is these holdings that the Court of Appeals for the Seventh Circuit rejected in reaching its judgment below. "[E]xclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct." *Ex parte Garland*, 4 Wall. 333, 377 (1867). "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer." *In re Ruffalo*, 390 U. S. 544, 550 (1968). In *Spevack* v. *Klein*, 385 U. S. 511, 514-16 (1967), this Court, overruling *Cohen* v. *Hurley*, 366 U. S. 117 (1961), held that disbarment proceedings, like criminal proceedings, are within the ken of the constitutional privilege against self-incrimination:

> We conclude that *Cohen* v. *Hurley* should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it. . . .
>
> * * * * *
>
> In this context, "penalty" is not restricted to fine or imprisonment. It means, as we said in *Griffin* v. *California*, 380 U.S. 609, the imposition of any sanction which makes the assertion of the Fifth Amendment privilege "costly". Id. . . .
>
> . . . We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others. Lawyers are not excepted from the words "No person . . . shall be compelled in any criminal case to be a witness against himself"; and we can imply no exception. Like the school teacher in *Slochower* v. *Board of Education*, 350 U. S. 551, and the policeman in *Garrity* v. *New Jersey* [385 U. S. 493 (1967)], lawyers also enjoy first-class citizenship.

The only other United States Court of Appeals that we have discovered to have passed on the question, the Court of Appeals for the Second Circuit, has also made clear that disbarment proceedings are penal in nature. In *Erdmann* v. *Stevens*, 458 F. 2d 1205, 1209-10 (2d Cir. 1972), in determining whether a federal court could enjoin a bar disciplinary proceeding, the Second Circuit held that such proceedings were criminal in nature:

> Although it is an open question whether the principles of *Younger* [v. *Harris*, 401 U.S. 37 (1971)], which involved a state criminal prosecution, apply with equal force to a civil suit, we need not face that issue here for the reason that in our view a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than a civil proceeding. A lawyer is not usually motivated solely by the prospect of monetary gain in seeking admission to the bar or in practicing in his chosen profession. However, it cannot be disputed that for most attorneys the license to practice law represents their livelihood, loss of which may be a greater punishment than a monetary fine. See Bradley v. Fisher, 80 U.S. [13 Wall.] 335, 355, 20 L.Ed. 646 (1872); Spevack v. Klein, 385 U.S. 511, 516, 87 S.Ct. 625, 17 L.Ed. 2d 574 (1967). Furthermore, disciplinary measures against an attorney, while posing a threat of incarceration only in cases of contempt, may threaten another serious punishment—loss of professional reputation. The stigma of such a loss can harm the lawyer in his community and in his client relations as well as adversely affect his ability to carry out his professional functions, particularly if his branch of the law is trial practice. Undoubtedly these factors played a part in leading the Supreme Court to characterize disbarment proceedings as being "of a quasi-criminal nature," In re Ruffalo, 390 U.S. 544, 551, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).

The judgment of the Court of Appeals for the Seventh Circuit that the immunity granted the Petitioner, under 18 U. S. C.

§6002, did not extend to the use of his compelled testimony in disbarment proceedings is, therefore, in conflict with the decisions of this Court and of the Court of Appeals for the Second Circuit, and should be reversed.

II. The Judgment Below, That a Federal Court Lacks Authority to Protect the Integrity of Its Own Processes by Barring the Use by Others of Testimony Compelled by It, Is Also Inconsistent with the Judgments of This Court and Those of Other Courts of Appeals.

The immunity order issued in this case specifically provided that the testimony secured under its compulsion could not be used against the witness in disbarment proceedings. This provision was included because the United States and the United States District Court were of the view that "to insure the integrity of the testimony" to be compelled, the immunity order had to contain a specific provision "prohibiting the use of the testimony so obtained in administrative proceedings involving bar disciplinary action." Exhibit B.

The validity of this authority is established by decisions of this Court and those of the Courts of Appeals for the Second and Fifth Circuits, among others. Statutory authority for this action by the district court is sustained by the judgment of this Court in *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 273 (1942), where, in explication of the All Writs Act, 28 U. S. C. § 1651(a), it was said: "Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it."

More frequently, however, the federal courts have not found resort to statute necessary to justify actions to protect the integrity of their own processes. "As we have already seen, and as has been many times declared by this court, the equitable

powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse, oppression and injustice, are inherent, and as extensive as may be required by the necessity for their exercise." *Gumbel* v. *Pitkin,* 124 U. S. 131, 145-46 (1888).

It was pursuant to this inherent authority that the Court of Appeals for the Second Circuit in *Sperry Rand Corp.* v. *Rothicin,* 288 F. 2d 245, 249 (2d Cir. 1961), foreclosed use in a state court of information divulged in discovery proceedings in the federal court. There, as in the case here, "No avenue available to it in the state courts was closed by the order; only use of the fruits of the federal court discovery was denied." The instant case would seem to be justified *a fortiori,* since here the evidence sought to be used had constitutional privilege until that privilege was removed to secure the production of the evidence in a federal criminal proceeding.

The same result (injunction against use of evidence taken in federal court), on the same grounds (the inherent authority of the federal court to its own processes), was taken by the Court of Appeals for the Fifth Circuit in *United States* v. *United Fruit Co.,* 410 F. 2d 553, 556 (5th Cir. 1969).

The fact is, too, that this Court has sustained the exercise of the same kind of process on the same grounds in *Rea* v. *United States,* 350 U. S. 214 (1956). There this Court approved the issuance of an injunction against use by a state court of evidence proferred to a federal court in the face of a constitutional privilege. The order there, too, rested upon no statutory authority, but only upon the ample inherent power of a federal court to protect the integrity of its own processes.

No question has been raised about the accuracy of the trial court's finding that the order preventing use of the testimony in the bar disciplinary proceedings was necessary "to insure the integrity of the testimony" to be secured. At the Court of Appeals level, the challenge went only to the power of the trial

court to act. The Court of Appeals, in the face of the authorities heretofore cited, chose to ignore rather than to face the question here presented, and rejected Petitioner's arguments *sub silentio*.

III. The Court of Appeals, by Precluding the Trial Court from Meeting Its Commitments to Petitioner, Made on the Representations of Both the United States and the Trial Court to the Petitioner, to Prevent the Use of Compelled Testimony in Disbarment Proceedings, Has Violated the Due Process Clause of the Fifth Amendment Under the Constructions of Due Process Announced by This Court.

The trial court and the United States assured Petitioner that, whether under 18 U. S. C. § 6002 or under the terms of the district court order, if he testified in the federal criminal proceedings, his testimony could not be used against him in state disbarment proceedings. Petitioner testified. The trial court attempted to meet its commitments, but was precluded from doing so by the Court of Appeals. Retrospectively, the Court of Appeals would declare that the word of the United States and the word of a United States District Court were not good. As Judge Pell stated in his pained concurrence, this action by the Court of Appeals not only generates an "uncomfortable feeling," but stands as "an inherent injustice under law." *In re Daley*, 549 F. 2d at 482, Appendix A at A21.

This reneging by courts or other government bodies on their representations as to the governing law has been repeatedly struck down by this Court. "The fact that the [immunity] is mistakenly granted is immaterial." *Johnson* v. *United States*, 318 U. S. 189, 197 (1913). For a government to turn its back on its commitments is a denial of "elementary fairness," *ibid.*, that calls for reversal of lower federal courts under this Court's supervisory authority, *Johnson*, *supra*, and reversal of state courts because such conduct constitutes a violation of due process of law, *Raley* v. *Ohio*, 360 U. S. 423 (1959); *Cox* v. *Louisiana*, 379 U. S. 559 (1965).

Under this Court's decisions, therefore, the action of the Court of Appeals was not only erroneous, but unconstitutional.

CONCLUSION.

Petitioner's right, under 18 U. S. C. § 6002, to preclude the use in a proceeding for "penalty" or "forfeiture" of testimony which was compelled from him in a federal court, is established by the judgments of this Court. This Court clearly regards disbarment proceedings as actions of a criminal nature, imposing penalties for alleged misbehavior. Petitioner's right to preclude such use of his testimony may also rest, however, on the special terms of the trial court's order which expressly forbade the use of his testimony in disbarment proceedings. The decisions of this Court sustain a trial court's authority to issue such an order to protect the integrity of its processes. Even if the United States and the United States District Court were in error in their representations to Petitioner as to the scope of the protection of the trial court order, they are both required, nonetheless, to adhere to their words. Failure to keep this commitment is an abridgement of "elemental fairness" or of "Due Process of Law", and falls afoul of the decisions of this Court.

For these reasons, Petitioner prays that this Honorable Court issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS,
Seventh Circuit.

No. 76-1657.

In re JOHN M. DALEY, a witness before the Special March 1974 Grand Jury.

Appeal of ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS.

Argued Nov. 3, 1976.
Decided Feb. 11, 1977.

John C. O'Malley, Chicago, Ill., for appellant.

Philip B. Kurland, George J. Murtaugh, Jr., William J. Martin, Chicago, Ill., for appellee.

Before PELL and SPRECHER, *Circuit Judges*, and DILLIN, *District Judge*.*

SPRECHER, Circuit Judge.

This case requires resolution of an issue related to the "difficult question" not reached by this court in *United States* v. *Braasch*, 505 F. 2d 139 (7th Cir. 1974), *cert. denied*, 421 U. S. 910, 95 S. Ct. 1561, 43 L. Ed. 2d 775 (1975): whether

* Honorable S. Hugh Dillin, United States District Judge for the Southern District of Indiana, is sitting by designation.

a federal prosecutor can prohibit the use of a witness' compelled testimony in subsequent state bar disciplinary proceedings involving that witness, through a broad grant of immunity. For reasons set forth below, we hold the conferral of such broad immunity to be beyond Fifth Amendment imperatives and beyond the authority of the federal prosecutor.

I.

In May 1974, the appellee, John M. Daley, who is an attorney licensed to practice law in the State of Illinois, was served with a subpoena which required his appearance and testimony before a Special Grand Jury. Upon being apprised of the subtance of this investigation, Daley, after consultation with his attorney, advised the United States Attorney of his intention to assert his Fifth Amendment privilege against self-incrimination if called to testify. The United States Attorney thereupon secured the authorization of the Assistant Attorney General to submit to the district court a request for an order immunizing Daley against the use of his compelled testimony under the provisions of 18 U. S. C. § 6002.[1] In addition to the statutory

1. This statute provides:

Whenever a witness refuses, on the basis of his privilege against self-incrimination to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

protections against subsequent use of compelled testimony, however, the application purported to specifically immunize Daley against any use of this testimony in state bar disciplinary proceedings. The United States Attorney offered his opinion that this broad immunity grant was warranted on the ground that "the United States Attorney's Office was concerned because of prior incidents that efforts might be made to pressure the witness Daley by threats of administrative action into not testifying or to testifying falsely. The United States Attorney's Office believed that to insure the integrity of the testimony it was necessary to include such a provision."

Daley was apparently assured by his own attorneys, as well as by the United States Attorney, of the validity of this unusual immunity grant, the United States Attorney offering his own judgment that, in any event, the statutory immunity authorization, 18 U. S. C. § 6002, interdicted subsequent use of such compelled testimony in bar disciplinary proceedings.

On July 18, 1974, Chief Judge Robson, upon being informed of these occurrences, entered an immunity order[2] which provided in pertinent part:

2. The court acted pursuant to 18 U. S. C. § 6003 which provides:

(a) in the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6022 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(Footnote continued on next page.)

> It Is Further Ordered that no testimony of the witness, John Daley, compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against him in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order, in accordance with the provisions of Section 6002, Title 18, United States Code.
>
> It Is Further Ordered that no testimony of the witness, John Daley, compelled under this order as above, may be used in any administrative proceeding, disciplinary committee, any bar association or state Supreme Court, in conjunction with any professional disciplinary proceeding or disbarment.

Daley testified, in compliance with the immunity order, before the Grand Jury and at the subsequent federal extortion trial of Cook County Commissioner Charles S. Bonk regarding his professional transactions with this public official.[3] Specifically, Daley related that he had transferred to Bonk thousands of dollars in bribes in order to assure the granting of zoning variances favorable to Daley's developer-clients.

Thereafter, the appellant, the Illinois Attorney Registration and Disciplinary Commission, instituted an inquiry to determine whether Daley's testimony indicated that professional disciplinary action was warranted. Acting on behalf of the Commission, an Inquiry Board denied Daley's motion to exclude the compelled testimony, while acknowledging that the testimony contained in the transcript of the Bonk trial constituted the premise upon which the inquiry into Daley's professional conduct was based.

(Footnote continued from preceding page.)

> (1) the testimony or other information from such individual may be necessary to the public interest; and
>
> (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

3. *United States* v. *Charles S. Bonk*, No. 75-CR-88 (N. D. Ill., June 6, 1975). The jury ultimately acquitted Bonk of 12 counts of extortion and five counts of income tax fraud.

Appellee next filed a motion in the district court to compel the Commission to comply with the provisions of the immunity order which disallowed any use of Daley's trial testimony in state bar disciplinary proceedings. Chief Judge Parsons ruled on May 28, 1976 that the prohibitions of the immunity order were valid and properly encompassed use by the Commission in its inquiry into Daley's fitness to continue in the practice of law. An order restraining appellant from all direct or indirect use of Daley's testimony was issued. The Commission appeals this decision.

II.

We first address the contention that the grant of immunity authorized by the pertinent federal statute, 18 U. S. C. §§ 6001-03, operates to proscribe the use of compelled testimony in subsequent state bar disciplinary proceedings on constitutional grounds. Because the conferral of immunity upon a witness in order to secure his testimony before a court or grand jury effectively abrogates the witness' right to invoke his Fifth Amendment privilege against incriminating himself, a statute authorizing immunity is constitutional only if it affords protection commensurate with that inherent in the Fifth Amendment. *Counselman* v. *Hitchcock*, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110 (1892); *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964); *Kastigar* v. *United States*, 406 U. S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). However, the immunity afforded by statute need not be "harmfully and wastefully broader" than the constitutional privilege. *Murphy, supra*, 378 U. S. at 107, 84 S. Ct. 1594 (White, J., concurring). The statute, deliberately phrased in the language of the Fifth Amendment,[4] immunizes the witness against use of his compelled testimony "in any criminal case," rather than against all potential opprobrium, penalties or disabilities which occur as a consequence of the compelled disclosures. *Brown* v.

4. *See* II National Commission on Reform of the Federal Criminal Laws, Working Papers, at 1416 (1970).

Walker, 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819 (1896); *Ullmann* v. *United States,* 350 U. S. 422, 76 S. Ct. 497, 100 L. Ed. 511 (1956). *Cf. Gardner* v. *Broderick,* 392 U. S. 273, 88 S. Ct. 1913, 20 L. Ed. 2d 1082 (1968). Thus, the salient constitutional inquiry involved here is whether a state bar disciplinary proceeding is a "criminal case" within the purview of the Fifth Amendment.

Denomination of a particular proceeding as either "civil" or "criminal" is not a talismanic exercise, but rather attaches "labels of convenience," *In re Gault,* 387 U. S. 1, 50, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), and tends to inhibit factual inquiry into the nature of the proceeding itself. The Supreme Court has determined that the "sole concern [of the self-incrimination clause] is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to criminal acts. . . .'" *Ullmann, supra,* 350 U. S. at 438-39, 46 S. Ct. at 507, *quoting Boyd* v. *United States,* 116 U. S. 616, 634, 6 S. Ct. 524, 29 L. Ed. 746 (1886); *accord Kastigar, supra,* 406 U. S. at 453, 92 S. Ct. 1653. In other words, the privilege against self-incrimination functions as a safeguard against rendering an individual criminally liable or subjecting him to prosecution for commission of a crime through the use of testimony coerced from him. Therefore, a "criminal case," for purposes of the invocation of the Fifth Amendment privilege, is one which may result in sanctions being imposed upon a person as a result of his conduct being adjudged violative of the criminal law.

The essence of state bar disciplinary proceedings however, is not a resolution regarding the alleged criminality of a person's acts, but rather a determination of the moral fitness of an attorney to continue in the practice of law. Although conduct which could form the basis for a criminal prosecution might also underlie the institution of disciplinary proceedings, the focus is upon gauging an individual's character and fitness, and not upon adjudging the criminality of his prior acts or inflicting punishment for them. As previously stated by this court:

> [D]isbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, sui generis, and result from the inherent power of courts over their officers. Such proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. *They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice. Thus the real question at issue in a disbarment proceeding is the public interest and an attorney's right to continue to practice a profession imbued with public trust.*

In re Echeles, 430 F. 2d 347, 349-50 (7th Cir. 1970) (citations omitted, emphasis added). *See also Ex parte Wall,* 107 U. S. 265, 288, 2 S. Ct. 569, 27 L. Ed. 552 (1882).

Thus, a clear distinction exists between proceedings whose essence is penal, intended to redress criminal wrongs by imposing sentences of imprisonment, other types of detention or commitment, or fines, and proceedings whose purpose is remedial, intended to protect the integrity of the courts and to safeguard the interests of the public by assuring the continued fitness of attorneys licensed by the jurisdiction to practice law. The former type of proceeding is, in actuality, "criminal" in nature and therefore within the ambit of the Fifth Amendment safeguards against self-incrimination; the latter is not.

Emphasis upon the penal or remedial aspects of a proceeding, rather than upon its label, for purposes of determining whether the Fifth Amendment prohibits the use of compelled, incriminatory testimony during the course of the proceeding erodes the basis for appellee's reliance upon cases like *Boyd, supra,* and *United States* v. *United States Coin and Currency,* 401 U. S. 715, 91 S. Ct. 1041, 28 L. Ed. 2d 434 (1971). In *Boyd,* the relevant customs act allowed the government to institute a civil forfeiture proceeding for the imported property involved, in addition to seeking imprisonment or a fine for violation of the law. The prosecutor waived the indictment, commenced a forfeiture

action and then sought to compel disclosures of the accused's books and records on the basis that the forfeiture proceeding involved a clearly civil remedy. The Court held that a case in which the question was whether the revenue laws had been violated is criminal for purposes of invoking the Fifth Amendment privilege; the type of paper filed by the prosecutor did not serve to alter the essence of the proceedings. *Accord, Lees* v. *United States,* 150 U. S. 476, 14 S. Ct. 163, 37 L. Ed. 1150 (1893).

Similarly, in *United States Coin and Currency, supra,* the government instituted forfeiture proceedings for money in the possession of an individual arrested for failure to file and pay gambling taxes pursuant to 26 U. S. C. § 4411. In affirming that the privilege against self-incrimination may be invoked in this nominally civil forfeiture proceeding, the Court declared that the forfeiture of the money to be used in gambling was the functional equivalent of the imposition of a fine for the gambling itself:

> When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise.

401 U. S. at 721-22, 91 S. Ct. at 1044.

The impact of *Boyd, Lees* and *United States Coin and Currency* is that government may not abrogate the accused's privilege against self-incrimination by electing the vehicle of a nominally civil proceeding, when in reality, punishment for activity which violates the criminal law is being imposed. This principle is inapposite to state bar disciplinary proceedings, which function not to determine whether specific conduct of an attorney is violative of the criminal law and necessitates the imposition of penal sanctions, but whether the respondent retains the attribute of moral fitness which is requisite to the fulfillment of an attorney's responsibilities to the court which licensed him, as well as to the public.

This distinction between proceedings which, in actuality, are cast in penal terms, and those which remain remedial in nature

is not impugned by the labelling of state bar disciplinary proceedings as "comparable to a criminal rather than to a civil proceeding" in *Erdmann* v. *Stevens,* 458 F. 2d 1205, 1209 (2d Cir.), *cert. denied,* 409 U. S. 889, 93 S. Ct. 126, 34 L. Ed. 2d 147 (1972), or as "adversary proceedings of a quasi-criminal nature" in *In re Ruffalo,* 390 U. S. 544, 551, 88 S. Ct. 1222, 1226, 20 L. Ed. 2d 117 (1968). These cases amply demonstrate the folly of reliance upon nominal labels in the process of constitutional adjudication, for neither case involves issues concerning the application of the privilege against self-incrimination.

Erdmann involved a denial by the federal district court of preliminary injunctive relief in a suit brought by an attorney seeking to enjoin state bar disciplinary proceedings against him. The court of appeals affirmed this refusal to intervene in state disciplinary proceedings, comparing the proceedings to criminal cases because the gravity of the state's interest is as pressing in the former instance as in the latter:

> Indeed the state's responsibility in these matters is primary. . . . [T]he proper functioning of the judicial system depends upon the competence and integrity of the members of the bar and their compliance with appropriate standards of professional responsibility. Thus, when state courts do initiate an inquiry into an attorney's conduct, they deal with a matter of such great importance to the state and its citizens that federal courts should be as slow to intervene in these proceedings as in state criminal proceedings.

458 F. 2d at 1213 (Lumbard, J. concurring).

In re Ruffalo, supra, determined that an attorney is entitled to fair notice of the charge which forms the basis for a disciplinary proceeding before being disbarred. Justice Douglas' denomination of disciplinary proceedings as quasi-criminal is manifestly not crucial to this holding, for as the Court observed, " '[s]uch procedural violation of due process would never pass muster in any normal civil or criminal litigation' "[5] 390 U. S. at

5. We further note that this determination that certain procedural due process safeguards are required in state bar disciplinary

(Footnote continued on next page.)

550-51, 88 S. Ct. at 1226. Thus, neither case is determinative of the issue here: whether state bar disciplinary proceedings are deemed "criminal" cases for purposes of requiring the exclusion of testimony compelled under a grant of immunity.

State courts which have considered this precise issue have unanimously responded negatively,[6] refusing to literally interpret *Erdmann* and *Ruffalo*. Because the primary function of state bar disciplinary proceedings is remedial, *i.e.*, maintenance of the integrity of the courts and the dignity of the legal profession as well as protection of the public, we agree and hold that the Fifth Amendment privilege against self-incrimination does not proscribe the introduction in state bar disciplinary proceedings of testimony compelled under a grant of immunity. This conclusion is consonant with the holdings of other federal courts

(Footnote continued from preceding page.)
proceedings neither transforms those proceedings into "criminal" matters nor mandates the incorporation of all procedural due process safeguards. *Cf. McKeiver* v. *Pennsylvania*, 403 U. S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971). Thus, state bar disciplinary proceedings "shall be conducted according to the practice of civil cases" with the standard of proof in all hearings fixed as "clear and convincing evidence." Ill. Rev. Stat. ch. 110A, § 753(c) (1975). Furthermore, the attorney-respondent in a state disciplinary proceeding may be called to testify and examined as an adverse witness pursuant to the Illinois Civil Practice Act, Ill. Rev. Stat. ch. 110, § 60 (1975). *In re Royal*, 29 Ill. 2d 458, 194 N. E. 2d 242 (1963).

6. *See, e.g. Maryland State Bar Ass'n.* v. *Sugarman*, 273 Md. 306, 329 A. 2d 1 (1974), *cert. denied*, 420 U. S. 974, 95 S. Ct. 1397, 43 L. Ed. 2d 654 (1975); *Committee on Legal Ethics of the West Virginia State Bar* v. *Graziani*, 200 S. E. 2d 353 (W. Va.), *cert. denied*, 416 U. S. 995, 94 S. Ct. 2410, 40 L. Ed. 2d 774 (1973); *In re Schwarz*, 51 Ill. 2d 334, 282 N. E. 2d 689, *cert. denied*, 409 U. S. 1047, 93 S. Ct. 527, 34 L. Ed. 2d 499 (1972); *Louisiana State Bar Ass'n.* v. *Ponder*, 263 La. 743, 269 So. 2d 228 (1972); *Kelly* v. *Greason*, 23 N. Y. 2d 368, 296 N. Y. S. 2d 937, 244 N. E. 2d 456 (1968); *Black* v. *State Bar of California*, 7 Cal. 3d 676, 103 Cal. Rptr. 288, 499 P. 2d 968 (1968); *Cate* v. *Rivers*, 246 S. C. 35, 142 S. E. 2d 369 (1965); *Florida State Bar* v. *Massfeller*, 170 So. 2d 834 (Fla. 1974); *In re Pennica*, 36 N. J. 401, 177 A. 2d 721 (1962); *In re Rouss*, 221 N. Y. 81, 116 N. E. 782 (1917), *cert. denied*, 246 U. S. 661, 38 S. Ct. 332, 62 L. Ed. 927 (1918).

that testimony taken pursuant to a statutory authorization for immunity may be introduced as evidence during a subsequent disciplinary proceeding without transgressing the Fifth Amendment privilege. *See, e.g., Napolitano* v. *Ward*, 457 F. 2d 279 (7th Cir.), *cert. denied*, 409 U. S. 1037, 93 S. Ct. 512, 34 L. Ed. 2d 486 (1972) (proceedings for removal of a judge); *Childs* v. *McCord*, 420 F. Supp. 428 (D. Md. 1976) (proceedings for revocation of professional engineers' certificates of registration). *Cf. Baxter* v. *Palmigiano*, 425 U. S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976); *Trippett* v. *Maryland*, 436 F. 2d 1153 (4th Cir.) *cert. granted sub nom. Murel* v. *Baltimore City Criminal Court*, 404 U. S. 999, 92 S. Ct. 567, 40 L. Ed. 2d 552 (1971), *writ dismissed as improvidently granted*, 407 U. S. 355, 92 S. Ct. 2091, 32 L. Ed. 2d 79 (1972).

It is clear that in enacting 18 U. S. C. §§ 6001-03, Congress is empowered to afford the immunized witness broader protection than that contemplated by the Fifth Amendment. *Reina* v. *United States*, 364 U. S. 507, 81 S. Ct. 260, 5 L. Ed. 2d 249 (1960); *Adams* v. *Maryland*, 347 U. S. 179, 74 S. Ct. 442, 98 L. Ed. 608 (1954). However, the pertinent legislative history evinces a clear intent to restrict the scope of immunity authorized by the statute to that which is constitutionally required.[7] H. R. Rep. No. 1549, 91st Cong., 2d Sess. 42 (1970); 1970 U. S. Code Cong. & Admin. News pp. 4007, 4017. *See also* II National Commission on Reform of the Federal Criminal Laws, Working Papers, at 1412 (1970). Moreover, because the quality of the practice of law so vitally affects the public welfare, the states maintain a paramount interest in requiring high standards for their attorneys. *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U. S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957); *Theard* v. *United States*, 354 U. S. 278, 77 S. Ct. 1274, 1 L. Ed. 2d 1342 (1957). In the absence of evidence of a

7. To achieve this end, language in earlier immunity statutes to the effect that an immunized witness attained protection from all "penalties and forfeitures" resulting from subsequent use of his testimony was deleted. II National Commission on Reform of the Federal Criminal Laws, Working Papers, at 1416.

contrary congressional intent, recognition of the state's interest mitigates against a broad construction of 18 U. S. C. §§ 6001-03 which would serve to preclude remedial action by the states to protect the public interest.[8]

III.

Appellee advances an additional constitutional claim, contending that regardless of the nature of the tribunal which attempts to introduce his compelled trial testimony, the Fifth Amendment privilege against self-incrimination forbids the use of any testimony coerced from an individual which may tend to incriminate him. We do not disagree with this argument, since the Supreme Court declared more than 50 years ago in *McCarthy* v. *Arndstein*, 266 U. S. 34, 45 S. Ct. 16, 69 L. Ed. 158 (1924):

> The privilege [against self-incrimination] is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. *It applies* alike to civil and criminal proceedings, *wherever the answer might tend to subject to criminal responsibility him who gives it.*

Id. at 40, 45 S. Ct. at 17 (emphasis added). *See also Spevack* v. *Klein*, 385 U. S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967).

Although the proceeding in which the privilege is asserted need not be criminal, the information for which the privilege is claimed must harbor the potential of exposing the speaker to a criminal or quasi-criminal charge. *Kastigar* v. *United States*, 406 U. S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d

8. *See* Working Papers, *supra*, at 1432-33, where it stated:

> Because of the major public interest considerations involved in the various fields of licensing, particularly in the areas of health and safety, there should be an effort to avoid immunity statute clauses which may be construed not only to bar punitive action, but also to bar remedial actions to protect the public. . . . The aim should be to draft language which will avert this danger, while at the same time protecting a witness from incriminating or penal consequences flowing from his testimony. This purpose can be accomplished by making use restriction the central concept in compulsory testimony acts and eliminating the "penalty or forfeiture" phrase.

212 (1972). However, the conferral of statutory immunity upon a witness dissolves the possibility that his testimonial statements may be used, either directly or indirectly, to implicate him criminally. Thus, the immunity protection effectively replaces the constitutional privilege, for,

> [t]he interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself,—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has been taken away, the Amendment ceases to apply.

Ullmann v. *United States*, 350 U. S. 422, 431, 76 S. Ct. 497, 502, 100 L. Ed. 511 (1956), *quoting Hale* v. *Henkel*, 201 U. S. 43, 67, 26 S. Ct. 370, 50 L. Ed. 652 (1906).

Appellee is safeguarded against the attachment of criminal liability by the grant of immunity pursuant to 18 U. S. C. § 6002. Since his trial testimony will not "incriminate" him, the Fifth Amendment is no bar to its introduction in state disciplinary proceedings.

IV.

In issuing the permanent restraining order of May 28, 1976, the district court declared:

> The immunity order entered by the Chief Judge of the United States District Court on July 18, 1974 is a valid order which is binding upon the Illinois Attorney Registration and Disciplinary Commission of the Illinois Supreme Court. The Court had the authority to enter this Order pursuant to 28 U. S. C. Section 1651, pursuant to 18 U. S. C. Section 6002, Article VI of the United States Constitution, pursuant to the interests of justice as mandated by the concern of the United States Attorney to preserve the integrity of testimony obtained in connection with criminal investigations.

Tr. at 4.

Throughout the briefs and oral arguments the parties to this cause have debated the question of whether the federal district court retains sufficient power to support the issuance of an

order which conferred immunity far broader than that contemplated by the statutory authority, 18 U. S. C. §§ 6001-03, upon a witness in federal proceedings. However, framing the salient issue in the context of the authority commanded by the federal court not only distorts the concept of immunity as it has developed throughout the course of Fifth Amendment adjudication, but also raises grave questions regarding the constitutionally-mandated separation of powers doctrine as well as vital considerations of federal-state comity. *Cf. Rizzo* v. *Goode*, 423 U. S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976).

It has long been recognized that the conferral of immunity upon a witness in order to secure his testimony represents a "rational accommodation" between legitimate, conflicting societal interests. Certainly, the individual witness maintains his privilege to refuse to give testimony which may tend to incriminate him, while the government retains strong interest in compelling the testimony, particularly in situations where, as evidently occurred in the *Bonk* case, "the only persons capable of giving useful testimony are those implicated in the crime." *Kastigar, supra,* 406 U. S. at 446, 92 S. Ct. at 1657. In attempting to effectuate Fifth Amendment as well as governmental concerns, immunity "has become part of our constitutional fabric. . . ." *Ullmann, supra,* 350 U. S. at 438, 76 S. Ct. at 506.

We begin with the premise that a witness has no vested right to a grant of immunity. However, once the bar of the privilege against self-incrimination has been raised by the witness, the decision whether to confer immunity in order to facilitate the government's investigation is the product of the balancing of the public need for the particular testimony or documentary information in question against the social cost of granting immunity and thereby precluding the possibility of criminally prosecuting an individual who has violated the criminal law. Therefore, the relative importance of particular testimony to federal law enforcement interests is a judgmental rather

than a legal determination, one remaining wholly within the competence of appropriate executive officials, *i.e.*, the United States Attorney with the approval of the Attorney General or his delegate.

The legislative history of 18 U. S. C. §§ 6001-03 illustrates that one of the concerns of Congress in revising the prior immunity laws was the clarification of the roles of the various governmental branches in the immunity process so as to avoid potential constitutional conflicts. Working Papers, *supra,* at 1406. The role of the federal court is restricted to a ministerial function. The court may scrutinize the record to ascertain that a request for immunity is, under the statute, jurisdictionally and procedurally well-founded and accompanied by the approval of the Attorney General. *See Ullmann, supra,* at 432-34, 76 S. Ct. 497. Under no circumstances, however, may a federal court prescribe immunity on its own initiative, or determine whether application for an immunity order which is both jurisdictionally and procedurally well-founded is necessary, advisable, or reflective of the public interest, for the federal judiciary may not arrogate a prerogative specifically withheld by Congress. *Earl* v. *United States,* 124 U. S. App. D. C. 77, 361 F. 2d 531 (1966); *Ellis* v. *United States,* 135 U. S. App. D. C. 35, 416 F. 2d 791 (1969); *In re Kilgo,* 484 F. 2d 1215 (4th Cir. 1973). *Accord, Morrison* v. *United States,* 124 U. S. App. D. C. 330, 365 F. 2d 521 (1966); *United States* v. *Jenkins,* 470 F. 2d 1061 (9th Cir. 1972), *cert. denied,* 411 U. S. 920, 93 S. Ct. 1544, 36 L. Ed. 2d 313 (1973); *In re Grand Jury Investigation,* 486 F. 2d 1013 (3d Cir. 1973), *cert. denied sub nom. Testa* v. *United States,* 417 U. S. 919, 94 S. Ct. 2625, 41 L. Ed. 2d 224 (1974); *In re Lochiatto,* 497 F. 2d 803 (1st Cir. 1974); *United States* v. *Allstate Mortgage Corp.,* 507 F. 2d 492 (7th Cir. 1974), *cert. denied,* 421 U. S. 999, 95 S. Ct. 2396, 44 L. Ed. 2d 666 (1975); *United States* v. *Leyva,* 513 F. 2d 774 (5th Cir. 1975); *Thompson* v. *Garrison,* 516 F. 2d 986 (4th Cir.), *cert. denied,* 423 U. S. 993, 96 S. Ct. 287, 46

L. Ed. 2d 263 (1975); *Application of the United States Senate Select Committee on Presidential Campaign Act*, 361 F. Supp. 1270 (D. D. C. 1973); *United States ex rel. Berberian* v. *Cliff*, 300 F. Supp. 8 (E. D. Pa. 1969). Hence, whether a federal immunity grant, the scope of which encompasses state bar disciplinary proceedings, was necessary or advisable in order to procure Daley's wholly unperjured testimony in the *Bonk* case remained a determination solely within the competence of the United States Attorney. The federal court could exercise no discretion beyond the statutory authorization.

Although it is correct, as appellee contends, that federal courts possess inherent equitable powers over their own process in order to secure judicial proceedings from abuse, *United States* v. *United Fruit Company*, 410 F. 2d 553 (5th Cir.), *cert. denied sub nom. Standard Fruit and Steamship Co.* v. *United States*, 396 U. S. 820, 90 S. Ct. 59, 24 L. Ed. 2d 71 (1969), the immunity order which is issued pursuant to 18 U. S. C. § 6003 is not a matter of judicial process or judicial discretion. The immunity power originates in the legislature, *United States* v. *Bryan*, 339 U. S. 323, 70 S. Ct. 724, 94 L. Ed. 884 (1950); its exercise is delegated solely to the executive. *Earl, supra; Ellis, supra; Kilgo, supra.* Consequently, the determination of whether the conferral of immunity is proper in a particular case "requires intimate familiarity with the nature and details of the investigation and the background of the witness." *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 100, 84 S. Ct. 1594, 1614, 12 L. Ed. 2d 678 (1964) (White, J., concurring). This is knowledge to which the federal prosecutor, and not the federal court, is privy, and it is therefore the authority of the United States Attorney to confer such extensive immunity which must be scrutinized.

Cast in these terms, the crucial question becomes whether the federal prosecutor, as the representative of the executive, retains under either statutory or inherent authority the power to declare a federal witness protected by such sweeping immunity. Statutory authority is clearly absent, for as previously noted, the legislative history evinces a clear intent to circumscribe the permissible scope of immunity to that mandated by the Fifth Amendment, and to preserve intact the effectiveness of state attempts to safeguard the public welfare through remedial action. H. R. Rep. No. 1549, 91st Cong., 2d Sess. 42 (1970); 1970 U. S. Code Cong. & Admin. News, pp. 4007, 4017. *See also* Working Papers, *supra*, at 1412, 1432-33. *Cf. Kastigar, supra*, 406 U. S. at 453-55, 92 S. Ct. 1653. Congress has equipped the federal prosecutor with potent tools, authorizing him to subject an evasive or prevaricating witness to a prosecution for perjury[9] or the contempt sanction.[10] These tools he may wield uninhibitedly in order to assure the integrity of the testimony compelled under 18 U. S. C. §§ 6001-03. The prosecutor may not, however, usurp, under the guise of statutory authorization, means far in excess of Fifth Amendment mandates which Congress neither contemplated nor intended.

9. 18 U. S. C. § 6002.

10. 28 U. S. C. § 1826 provides:

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—
>
> (1) the court proceeding, or
>
> (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.
>
> (b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but no later than thirty days from the filing of such appeal.

Viewing the immunity grant in its proper perspective as a powerful executive implement, it must be recognized that prosecutorial agreement may effectively function, extra-statute, to confer immunity other than through a legislatively-authorized method. Through the exercise of his inherent discretion, the federal prosecutor retains control over the nature and scope of immunity granted. However, in promising to refrain from prosecution in order to secure a witness' cooperation, the federal prosecutor must act within the ambit of his authority, *cf. People* v. *Ford,* 99 U. S. 594, 25 L. Ed. 399 (1878), and may not permissibly bind officials in jurisdictions within which he possesses no right of action. *Cf. United States* v. *Boulier,* 359 F. Supp. 165 (E. D. N. Y.), *aff'd, United States* v. *Nathan,* 476 F. 2d 456 (2d Cir. 1973), *cert. denied, Nathan* v. *United States,* 414 U. S. 823, 94 S. Ct. 171, 38 L. Ed. 2d 56 (1974). An agreement between Daley and the United States Attorney that the former would be shielded by informal transactional immunity from all federal prosecution stemming from incidents about which information was gleaned from Daley's testimony represents the extent of the prosecutor's innate power and discretion. In purporting to confer immunity which superseded both the pertinent statutory delegation of authority and the inherent discretionary powers of the federal prosecutor, through encompassing state remedial proceedings not contemplated by the Fifth Amendment, the United States Attorney acted outside the scope of his jurisdiction and utterly without authorization of law.[11] His actions are therefore bereft of validity. *Cf. Harmon* v. *Brucker,* 355 U. S. 579, 78 S. Ct. 433, 2 L. Ed. 2d 503 (1958).

Appellee asserts, however, that in attempting to preclude the legitimate functioning of a state bar disciplinary committee,

11. Although the federal courts clearly may not supervise or direct the executive department in the manner or mode in which it performs its functions, the judicial power extends to the prevention of members of the executive branch from assuming jurisdiction in areas in which there exists no legal right to act. *Giancana* v. *Hoover,* 322 F. 2d 789 (7th Cir. 1963).

over which no federal jurisdiction prevails, the federal prosecutor accomplishes no more than in the case where, through a grant of immunity, the prosecutor may effectively preempt the possibility of state use of the immunized testimony in state criminal proceedings. The fallaciousness of such reasoning is readily apparent, for in the latter case it is the constitutional mandate of the Fifth Amendment, rather than the machinations of the federal prosecutor, which operates to preclude subsequent state use of federally-compelled testimony in state criminal prosecutions. *Murphy, supra.*

V.

Appellee's final contention is that the federal court is estopped from refusal to enforce the May 28, 1976 and July 18, 1974 immunity orders issued below on due process grounds. Appellee asserts that he replied upon the validity of these judicial pronouncements in determining whether to comply with the immunity order by testifying to the full extent of his knowledge, or whether to persist in his refusal to testify and thereby risk the sanction of contempt.[12] His claim, then, is that his decision to accept the proffered immunity was based upon the understanding, which he shared with the court and the United States Attorney that the immunity extended to use of his testimony in state bar disciplinary proceedings. For the federal court to elicit this choice from appellee and then subsequently retract its promise to him is the claimed due process contravention.

We have already determined that the immunity orders issued below represented invalid acts on the part of the United States Attorney beyond the statutory and inherent authority of the federal prosecutor which the district court should have refused to ratify on jurisdictional grounds. The superficially

12. Appellee's statement to the effect that federal officials were "further of the view that immunity against use of Appellee's testimony in criminal prosecution alone was not sufficient to secure Appellee's uninhibited testimony," Appellee's Brief, at 21, indicates that Daley may have also contemplated divulging information which was less than complete.

appealing logic of appellee's position regarding his due process rights is readily dispelled upon closer scrutiny of its underlying premises. The characterization of the position of an immunized witness who possesses information deemed necessary by the government as entitling the witness to freely "choose" whether to divulge the information or to be incarcerated for contempt represents a transmogrification of the fundamental concept that the "duty to give testimony before a duly constituted tribunal" devolves upon each individual, "unless he invokes some valid legal exemption in withholding it." *Ullmann, supra,* 350 U. S. at 439 n. 15, 76 S. Ct. at 507. *See also Brown* v. *Walker,* 161 U. S. 591, 600, 16 S. Ct. 644, 40 L. Ed. 819 (1896); *Piemonte* v. *United States,* 367 U. S. 556, 559 n. 2, 81 S. Ct. 1720, 6 L. Ed. 2d 1028 (1961). Conferral of immunity which was coextensive with Daley's privilege against self-incrimination effectively removed the taint of criminality from his testimony, as well as any valid reason for assertion of the privilege. *United States* v. *Cappetto,* 502 F. 2d 1351, 1359 (7th Cir. 1974), *cert. denied,* 420 U. S. 925, 95 S. Ct. 1121, 43 L. Ed. 2d 395 (1975). Simply stated, any "choice" regarding testimony remaining to Daley vanished upon the grant of immunity pursuant to 18 U. S. C. §§ 6001-03. A grant of immunity under the statute, which is only as broad as the privilege against self-incrimination, is sufficient to compel whatever testimony is deemed necessary by the federal prosecutor; since there is no "choice" in any sense to be made by an immunized witness, the breadth of the scope of immunity conferred cannot legitimately be claimed as a "factor" in an illusory "choice" of testifying or being adjudged in contempt.

As previously stated, false or evasive testimony subjects an immunized witness to prosecution for perjury or to the sanction of contempt. Moreover, as expatiated by the Second Circuit, false or evasive testimony constitutes a breach of the immunity provisions which expunges the concomitant protections.

> The theory of immunity statutes is that in return for his surrender of his Fifth Amendment right to remain silent lest he incriminate himself, the witness is promised that he will not be prosecuted based on the inculpatory evidence he gives in exchange. However, the bargain struck is conditional upon the witness who is under oath telling the truth. If he gives false testimony, it is not compelled at all. In that case, the testimony given not only violates his oath, but is not the incriminatory truth which the Constitution was intended to protect. Thus, the agreement is breached and the testimony falls outside the constitutional privilege.

United States v. *Tramunti,* 500 F. 2d 1334, 1342 (2d Cir.), *cert. denied,* 419 U. S. 1079, 95 S. Ct. 667, 42 L. Ed. 2d 673 (1974).

A grant of immunity which was coterminous with the statutory provisions would have been sufficient to compel Daley to divulge the information regarding his professional transactions with Bonk which he ultimately provided. Daley's right to assert his privilege against self-incrimination entitled him to no more protection than that mandated by the Fifth Amendment, and the same testimony could have been compelled by a grant which promised no more than that. Accordingly, we find no due process contravention in the fact that the immunity protection actually afforded Daley was narrower in scope than that promised him.

The order entered by the district court restraining appellant from use of Daley's testimony in state bar disciplinary proceedings is hereby

Reversed.

PELL, Circuit Judge, concurring.

I concur with considerable reluctance in the opinion authored by Judge Sprecher. This in no way reflects upon the thorough analysis of the issue and the correct and scholarly application of the law thereto found in that opinion. My reluctance stems from the uncomfortable feeling that there is an inherent injustice under law when a witness gives testimony under the compulsion of contempt and that testimony is to be used against him in a disciplinary proceeding which could result in a substantial

penalty against him although two of the three branches of the federal government have explicitly assured the witness that the compelled testimony cannot be used against him in a disciplinary proceeding, one such assurance being in the form of a judgment of a United States court.

Notwithstanding that Judge Sprecher's carefully drawn opinion demonstrates beyond any real argument that the result I have just described is the inexorable one under our law, I have nevertheless made a reexamination of the controlling authorities from the point of view of determining whether the above result is necessary, and I have concluded it is.

Little purpose is served by retracing the route that the principal opinion has so fully traversed. I therefore add only a few observations garnered along the way. Certainly the initial one is that we are dealing with a first impression issue. There are cases in which the damaging testimony has been used in disciplinary proceedings notwithstanding a grant of immunity. See the *Annotation* collecting such cases, 62 A. L. R. 3d 1145 (1975). The holding of these cases is that the testimony may be used. No case, however, of which I am aware, had the additional element of purporting to immunize explicitly against use in disciplinary proceedings.

Daley argues, with at least surface presuasiveness. that the federal government cannot refuse to enforce the order it has issued which has put the attorney in the particular position in which he now finds himself, or in other words, that the federal government, presumably including the federal courts, is now estopped from not using its authority to protect the appellee in the way it said it would. Certainly here a fair case can be made out of substantial detriment by a change of position in reliance on the government's conduct. *See United States* v. *Saladoff*, 233 F. Supp. 255, 258 (E. D. Pa. 1964), *aff'd. sub nom. United States* v. *Feinberg*, 372 F. 2d 352 (3d Cir. 1967) (en banc). Applicability of the doctrine of estoppel would seem to end there. At the outset we have the general rule that the United

States is not subject to an estoppel which impedes the exercise of governmental functions as contrasted with proprietary ones. 28 Am. Jur. 2d *Estoppel and Waiver* § 132, at 799-802 (1966). Aside from this underlying general proposition, it would appear that estoppel would scarcely be applicable if the fundamental basis for the estoppel, here the district court judgment, was itself without a foundation of legality. That brings us back to the demonstration contained in Judge Sprecher's opinion that the United States Attorney exceeded his statutory power with regard to the disciplinary immunity.

The question might conceivably remain, however, whether the court itself had some inherent power outside of the immunity statute here involved. The court's function insofar as the statutory procedures are concerned would appear to be purely ministerial, *cf. Application of United States Senate Select Committee on Presidential Campaign Activities*, 361 F. Supp. 1270 (D. D. C. 1973); however, Daley argues that the court itself was justified in entering the order of immunity and taking the action now directly under review upon several bases: 28 U. S. C. § 2283, which permits the issuance of injunctions where necessary in aid of a district court's jurisdiction or to protect or effectuate its judgments; the All Writs Act, again as a proper means for protecting its jurisdiction as it asserted it in the original immunity order; and inherent authority to protect the integrity of its processes. I find myself unable to agree that any of these bases would justify the injunctive relief here under review unless the original order of immunity was legally deserving of protection. Returning therefore to that original order, there was no basis for its entry unless there was an inherent power for the action.

No direct authority has come to my attention dealing with the courts' power to grant immunity aside from the ministerial function relating to applications from the United States Attorney. The suggestions, at least in the cases, would clearly indicate that the exercise of the determination to grant immunity is not

for the courts. *Application, supra* at 1277, refers to not usurping the constitutional power of a coordinate branch, in this case the Executive. From the same source we find a reference to the judicial function being the determination of "right" or "wrong" while a decision to grant immunity is not "right" or "wrong" but immunity agreement and whether the court had acquiesced in the purely a matter of discretion. *Id.* at 1278. In *United States* v. *Rand*, 308 F. Supp. 1231, 1236-37 (N. D. Ohio 1970), a question was involved as to the protective scope of the claimed immunity agreement and whether the court had acquiesced in the grant of the immunity. The court observed that "[w]hether this silence was an acquiescence is unnecessary to decide. It was the Government to whom [the defendants] looked for immunity, not the Court." *Id.* at 1237.[1]

While perhaps these observations were keyed to the fact that what was before the court in the aforementioned cases was the matter of the scope of the courts' function under particular immunity statutes, the statement of then Judge Burger in *Earl* v. *United States*, 124 U. S. App. D. C. 77, 361 F. 2d 531, 534 (1966), *cert. denied*, 388 U. S. 921, 87 S. Ct. 2121, 18 L. Ed. 2d 1370 (1967), clearly places the ultimate responsibility for the manner in which immunity would be granted upon the Legislative branch:

> What Appellant asks this Court to do is command the Executive Branch of government to exercise the statutory power of the Executive to grant immunity in order to secure relevant testimony.This power is not inherent in the Executive and surely is not inherent in the judiciary. In the context of criminal justice it is one of the highest forms of discretion conferred by Congress on the Executive, *i.e.*, a decision to give formal and binding absolution in a judicial proceeding to insure that an individual's testimony will be compelled without subjecting him to criminal prosecution for what he may say.

1. *Rand*, which held that the individuals were entitled to rely upon the assurances of the United States Attorney, is of no help to Daley as the subsequent testing of the validity of the grant of immunity in *Rand* was in the context of a federal criminal trial.

See also a discussion of authorities to the effect that the grant of the power to give immunity must come from the Legislature in *Apodaca* v. *Viramontes*, 53 N. M. 513, 212 P. 2d 425 (1949).

Finally, it might be argued that there was in law an agreement between the United States Attorney and Daley that Daley would not be subject to disciplinary proceedings, which agreements should be enforced. Some cases apparently speak of the immunity grant in contractual terms. 22 C. J. S. *Criminal Law* § 46(7), at 179-80 (1961). This again, however, is predicated upon a constitutional or statutory provision which is non-existent in the present case. Nearly a century ago, the Supreme Court in the *Whiskey Cases*, 99 U. S. (9 Otto) 594, 25 L. Ed. 399 (1878), held that the United States Attorney had no authority to enter an agreement that persons accused of an offense against the United States would not be prosecuted or their property subjected to condemnation in consideration of the defendants testifying against their co-conspirators.

In sum, if policy factors involved in the public interest and concern in fighting crime, when balanced against the public interest in the integrity of the legal profession, are deemed to be stronger on the side of the former, the answer to that effect must come from the Congress.

APPENDIX B

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

IN RE: JOHN DALEY, A WITNESS BEFORE THE SPECIAL MARCH 1974 GRAND JURY	}	71 GJ 3567

ORDER

This matter coming on to be heard on the petition of the United States of America, by James R. Thompson, United States Attorney for the Northern District of Illinois, for an order instructing John Daley to testify and to produce evidence before the Special March 1974 Grand Jury, said John Daley being a witness before the said grand jury who has asserted his privilege against self-incrimination, and the Court having considered said petition of the United States Attorney and the letter approving the application of this Court from the Assistant Attorney General of the Criminal Division, United States Department of Justice, attached to said petition:

IT IS HEREBY ORDERED that John Daley shall not be excused from testifying or from producing books, papers or other evidence before the said grand jury on the ground that the testimony or evidence required of him may tend to incriminate him, and that John Daley shall proceed forthwith to the place of meeting of the said grand jury and answer the questions which he is asked and produce what evidence is required of him without further asserting his privilege against self-incrimination, and IT IS FURTHER ORDERED that no testimony of the witness, John Daley, com-

pelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against him in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order, in accordance with the provisions of Section § 6002, Title 18, United States Code.

IT IS FURTHER ORDERED that no testimony of the witness, John Daley, compelled under this order as above, may be used against him in any administrative proceeding, disciplinary committee, any bar association or state Supreme Court, in conjunction with any professional disciplinary proceeding or disbarment.
Enter:

/s/ EDWIN A. ROBSON
U. S. District Court Judge

Dated at Chicago, Illinois this 18th day of July, 1974.

APPENDIX C

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

IN RE: JOHN M. DALEY,
A WITNESS BEFORE THE
SPECIAL MARCH 1974
GRAND JURY

71 GJ 3567

ORDER

This matter having come before this Court on the Motion to Compel Compliance with Immunity Order filed on May 17, 1976 on behalf of John M. Daley, a witness before the Special March 1974 Federal Grand Jury with notice to the Illinois Attorney Registration and Disciplinary Commission of the Illinois Supreme Court through Carl H. Rolewick, Administrator, John O'Malley, Staff Attorney, and the Members of Inquiry Panel D of the Commission, Chairman Daniel J. Ahern and Members Arthur M. Scheller, Jr., and Arnold B. Kanter, and Samuel K. Skinner, United States Attorney for the Northern District of Illinois, and the Court having examined the Motion to Compel Compliance with Immunity Order and all exhibits submitted in support thereof including the Affidavits of Anton R. Valukas and George J. Murtaugh, arguments having been presented on behalf of all parties in open court through their respective attorneys and the Court having jurisdiction over the subject matter of the parties, and the Court being fully advised in the premises finds:

(1) This Court has continuing jurisdiction over the use of the compelled testimony derived from 71 GJ 3567 in the Special March 1974 Grand Jury and *United States* v. *Bonk*, 75 CR 88

and furthermore has continuing jurisdiction in regard to enforcement of order emanating from this Court.

(2) The United States Attorney for the Northern District of Illinois filed a petition for an Order granting immunity requiring the witness John M. Daley to testify and produce evidence before the Special March 1974 Federal Grand Jury, subject to the provision, *inter alia,* that no testimony or other information directly or indirectly compelled under the Order may be used against John M. Daley in any ". . . administrative proceeding, disciplinary committee, any bar association or State Supreme Court, in conjunction with any professional proceeding or disbarment . . ."

(3) The United States Attorney requested that a provision prohibiting the use of compelled testimony in disciplinary proceedings be included in the immunity order because of prior incidents indicating that efforts may be made to pressure federal grand jury witnesses by threats of administrative action into not testifying or testifying falsely. The United States Attorney's office believed that it was necessary to include such a provision in its petition for immunity.

(4) On July 18, 1974, United States District Court Judge Edwin Robson entered an Order after being presented with the Petition of the United States Attorney for the Northern District of Illinois described in paragraph (2) *supra.* The Order provided *inter alia* ". . . that no testimony of the witness, John Daley, compelled under this order as above, may be used against him in any administrative proceeding, disciplinary committee, any bar association or state Supreme Court, in conjunction with any professional disciplinary proceeding or disbarment."

(5) John M. Daley was informed by his attorney that it was the opinion of the United States Attorney's office that the aforestated provision in Judge Robson's immunity order would prohibit the use of Mr. Daley's testimony in any disciplinary proceeding. Mr. Daley was further informed by his attorney that he could rely upon this assurance.

(6) Before waiving his privilege against self-incrimination by testifying before the Special March 1974 Grand Jury, the witness, John M. Daley, informed his attorney that due to the assurances of the United States Attorney's office and the explicit terms of the immunity order of July 18, 1974 regarding the exclusion of his testimony in any disciplinary proceeding, he would rely upon the order and testify.

(7) The Special March 1974 Federal Grand Jury returned an indictment subsequently captioned *United States* v. *Charles Bonk*, 75 CR 88 and the United States Attorney informed Mr. Daley that he would be compelled to testify in the *Bonk* trial as a result of the July 18, 1974 immunity order. The United States Attorney stated in a letter dated June 2, 1975 to Mr. Daley's attorney, George J. Murtaugh, that the judicial proceedings against Mr. Bonk arose from the grand jury before which Mr. Daley appeared pursuant to the immunity order and he further stated that the terms of the July 18, 1974 immunity order would apply to Mr. Daley's trial testimony.

(8) Mr. Daley subsequently testified in *United States* v. *Bonk*, 75 CR 88 and his testimony in that trial was directly related to and repeated his immunized testimony before the Special March 1974 Federal Grand Jury.

(9) The immunity order entered by the Chief Judge of the United States District Court on July 18, 1974 is a valid order which is binding upon the Illinois Attorney Registration and Disciplinary Commission of the Illinois Supreme Court. The Court had the authority to enter this Order pursuant to its inherent common law power, pursuant to 28 U. S. C. Section 1651, pursuant to 18 U. S. C. Section 6002, Article VI of the United States Constitution, pursuant to the interests of justice as mandated by the concern of the United States Attorney to preserve the integrity of testimony obtained in connection with criminal investigations.

It is therefore ORDERED, ADJUDGED and DECREED that the Attorney Registration and Disciplinary Commission of the Illinois Supreme Court, acting through its agents, Carl H. Rolewick, Administrator of the Commission, John C. O'Malley, Staff Attorney, and Inquiry Panel D consisting of Chairman Daniel Ahern and Members Arthur M. Scheller, Jr., and Arnold B. Kanter, is hereby restrained from directly or indirectly using the compelled testimony of the witness John M. Daley before the March 1974 Federal Grand Jury in any disciplinary proceeding and is further restrained from using directly or indirectly the compelled testimony of the witness John M. Daley in the trial captioned *United States* v. *Charles Bonk*, 75 CR 88 in the United States District Court in any disciplinary proceeding insofar as that subsequent testimony was derived from and repeated the testimony before the Special March 1974 Grand Jury.

/s/ JAMES B. PARSONS
James B. Parsons
Judge, United States District Court

Entered this 28th day of May, 1976.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 28, 1977.

Before

HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. S. HUGH DILLIN, *District Judge**

In Re: JOHN M. DALEY, a witness before the Special March 1974 Grand Jury No. 76-1657 Appeal of: Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois	Appeal from the United States District Court for the Northern District of Illinois Eastern Division. No. 71-GJ-3567 James B. Parsons, *Judge.*

On consideration of the petition for a rehearing by the Court in the above-entitled appeal, no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled appeal be, and the same are hereby Denied.

* Honorable S. Hugh Dillin, United States District Judge for the Southern District of Indiana, is sitting by designation.

APPENDIX E

INDEX

PAGE

Exhibit A (Letter from Henry E. Petersen, Assistant Attorney General) A34
Exhibit B (Affidavit of Anton R. Valukas, First Assistant United States Attorney) A35
Exhibit C (Affidavit of George J. Murtaugh, Jr., an attorney for Petitioner) A38
Exhibit D (Petition of United States for Immunity Order) A41
Exhibit E (Immunity Order of July 18, 1974) A43
Exhibit F (Letter from James R. Thompson, United States Attorney) A45
Exhibit G (Letter from John C. O'Malley, an attorney for Respondent) A46
Exhibit H (Letter from William J. Martin, an attorney for Petitioner) A47
Exhibit I (Petitioner's Motion to Exclude Direct and Derivative Use of Compelled Testimony, filed with Respondent) A50
Exhibit J (Petitioner's Memorandum of Law in Support of Motion to Exclude Direct and Derivative Use of Compelled Testimony, filed with Respondent) A53
Exhibit K (Transcript of Proceedings of February 17, 1976, before Respondent) A65
Exhibit L (Transcript of Proceedings of April 9, 1976, before Respondent) A82

Exhibit A

DEPARTMENT OF JUSTICE
WASHINGTON 20920

June 25, 1974

Mr. James R. Thompson, Jr.
United States Attorney
Chicago, Illinois

Attention: Mr. Anton R. Valukas
Assistant United States Attorney

Re: *Grand Jury Investigation*

Dear Mr. Thompson:

Your request for authority to apply to the United States District Court for the Northern District of Illinois for an order or orders requiring John Daley to give testimony or provide other information pursuant to 18 U. S. C. 6002-6003 in the above matter and in any further proceedings resulting therefrom or ancillary thereto is hereby approved pursuant to the authority vested in me by 18 U. S. C. 6002-6003 and 28 C. F. R. 0.175.

Sincerely,

/s/ HENRY E. PETERSEN
Henry E. Petersen
Assistant Attorney General

Exhibit B

AFFIDAVIT

STATE OF ILLINOIS }
COUNTY OF COOK } ss

Anton R. Valukas, on oath states and deposes as follows:

1. That he is First Assistant United States Attorney for the Northern District of Illinois.

2. That during the year 1974 he was in charge and responsible for an investigation before the Federal Grand Jury, 71 GJ 3567.

3. That in June of 1974 he caused to have issued on behalf of the Special March 1974 Grand Jury a subpoena to Mr. John Daley, which subpoena commanded Mr. Daley's appearance before the Special March 1974 Grand Jury.

4. Thereafter, he was contacted by Mr. George Murtaugh, an attorney who was representing Mr. Daley. Mr. Murtaugh requested that the United States Attorney's Office inform him of the nature and scope of the investigation and Mr. Daley's status in the investigation. The United States Attorney's Office informed Mr. Murtaugh that the investigation related to allegations that persons doing business with Cook County Commissioners were required to make payments in order to secure zoning changes. Affiant further informed Mr. Murtaugh that Mr. Daley was being subpoenaed to testify as to his knowledge concerning these matters.

Affiant was subsequently notified by Mr. Murtaugh that upon his advice Mr. Daley was going to assert his privilege against self-incrimination before the grand jury and in response to questions by Internal Revenue Service.

Thereafter affiant informed Mr. Murtaugh that it was the intention of the United States Attorney's Office to compel the

testimony of Mr. Daley through the use of immunity grant and court order. Affiant further informed Mr. Murtaugh that after conversations with the United States Attorney and others that it was the decision of the United States Attorney's Office that they would seek to have included in the immunity grant, a provision prohibiting the use of the testimony so obtained in administrative proceedings involving bar disciplinary action.

Affiant informed Mr. Murtaugh that the United States Attorney's Office was concerned because of prior incidents that efforts might be made to pressure the witness Daley by threats of administrative action into not testifying or to testifying falsely. The United States Attorney's Office believed that to insure the integrity of the testimony it was necessary to include such a provision.

Moreover, at that time or thereafter affiant informed Mr. Murtaugh and he believes Mr. Murtaugh's client, Mr. Daley, that it was the opinion of the United States Attorney and the United States Attorney's Office that Section 6002, Title 18 would in any event prohibit the use of immunized testimony in bar disciplinary proceedings.

Subsequent to that time affiant prepared a petition requesting that the court enter an order compelling the testimony of John Daley before the Special March 1974 Grand Jury with the provision:

> "That no testimony or other information compelled under the order or any information directly or indirectly derived from such testimony or such other information may be used against him in any criminal case, administrative proceeding, disciplinary committee, any bar association or State Supreme Court in conjunction with any professional disciplinary proceedings or disbarment except a prosecution for perjury, giving a false statement or otherwise failing to comply with the order."

Affiant informed Chief Judge Edwin Robson, United States District Court, Northern District of Illinois of the intention of

the United States Attorney's Office to present such a petition, explained to Chief Judge Robson the reasons why the United States Attorney's Office was going to present such a petition and further that the United States Attorney's Office would request that Chief Judge Robson enter an order containing the above described provisions.

After being fully apprised of the facts the Chief Judge, upon a petition of the United States Attorney's Office, did enter such an order.

/s/ ANTON R. VALUKAS
Anton R. Valukas

Subscribed and Sworn to before me this 13 day of February, 1976.

/s/ GERALDINE J. KAHAS
Notary Public

(SEAL)

Exhibit C

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

AFFIDAVIT

George J. Murtaugh, Jr. on oath states and deposes as follows:

1. That he is and has been since March, 1974, Attorney of Record for John M. Daley.

2. That on or about May 15, 1974, James R. Thompson, United States Attorney for the Northern District of Illinois, caused a Grand Jury Subpoena to issue and be served upon John M. Daley, to appear and give testimony before the Special March 1974 Grand Jury in a matter then under consideration and investigation before the said Grand Jury.

3. Upon receipt of the Grand Jury Subpoena by John M. Daley, I conferred with Mr. Daley and then telephoned the office of Assistant United States Attorney Anton R. Valukas to arrange an appointment. Mr. Valukas was at this time conducting and directing an investigation before the Special March 1974 Grand Jury, more specifically captioned 71 GJ 3567.

4. That in the first of several meetings with Mr. Valukas, I was advised of the nature of the investigation, the intention, purpose and the objectives of the United States Attorney in summoning John M. Daley to appear before the Special March 1974 Grand Jury. In several subsequent meetings and/or conversations with Mr. Valukas, affiant advised Mr. Valukas that John M. Daley when called to testify would assert his privilege against self-incrimination and would refuse to answer questions put to him by The United States Attorney's office or his agents, including representatives of the Intelligence Division of the Internal Revenue Service.

5. That during subsequent conversations and meetings with Mr. Valukas, affiant was advised that Mr. Valukas and Mr.

James R. Thompson had conferred and discussed the pending investigation and it was the intention of the United States Attorney's office to compel the testimony of Mr. Daley through the use of a grant of immunity and court order pursuant to Section 6002 of Title 18 U. S. C. Affiant was further advised by Mr. Valukas that after conversations with the United States Attorney and others that it was the decision of the United States Attorney's office to include in the immunity grant, a provision prohibiting the use of the compelled testimony in any administrative or disciplinary proceeding.

6. In connection with the prohibition against use of the compelled testimony in an administrative or disciplinary proceeding, affiant was advised that it was the government's intention to seek those protections they deemed necessary to assure effective production, preservation and disclosure of evidence before the Special March 1974 Grand Jury.

7. Affiant was advised that the United States Attorney's office had experienced in the past and might experience in this particular matter the use of varying pressures such as administrative actions and threats of disciplinary proceedings which might possibly undermine effective investigation and prosecution.

8. Affiant was informed in connection with the petition for immunity and the order granting immunity pursuant to Section 6002, Title 18, that it was the opinion of the United States Attorney and the United States Attorney's office that this section and provision would prohibit the use of John M. Daley's testimony in any administrative or disciplinary proceeding. This information was communicated to my client with my assurance that the same could be relied upon.

9. Affiant was advised that a petition had been prepared for an Order of Immunity pursuant to Section 6002, Title 18 U. S. C., and that such petition would be presented to Chief Judge Edwin Robson together with the particular and specific provision that no testimony or other information directly or

indirectly derived from such testimony be used against Mr. Daley in any criminal proceeding, disciplinary committee, any professional disciplinary proceedings or disbarment, except a prosecution for perjury, giving a false statement or otherwise failing to comply with the Order.

10. Affiant and John M. Daley appeared before Chief Judge Edwin Robson, United States District Court, Northern District of Illinois, where Chief Judge Edwin Robson inquired of John M. Daley whether he understood the import of the order and upon receiving an affirmative response, Chief Judge Edwin Robson executed the entire order of immunity, and directed John M. Daley to appear before the Special March 1974 Grand Jury.

11. Before waiving his privilege against self-incrimination by testifying before the Grand Jury, my client informed me that due to the assurances of the United States Attorney's office and the explicit terms of Judge Robson's order regarding the exclusion of his testimony in any disciplinary proceeding, he would rely upon the order and testify.

/s/ GEORGE J. MURTAUGH, JR.
George J. Murtaugh, Jr.

Subscribed and sworn to before me this 16th day of February, 1976.

/s/ AIDA GRISWOLD
Notary Public

(SEAL)

Exhibit D

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

IN RE: JOHN DALEY, A WITNESS BEFORE THE SPECIAL MARCH 1974 GRAND JURY	71 GJ 3567

PETITION FOR ORDER GRANTING IMMUNITY PURSUANT TO SECTION 6002, TITLE 18, UNITED STATES CODE, TO COMPEL TESTIMONY BEFORE THE SPECIAL MARCH 1974 GRAND JURY

Now comes the United States of America by James R. Thompson, United States Attorney for the Northern District of Illinois, and states as follows:

1. The Special March 1974 Grand Jury for the Northern District of Illinois is now conducting an investigation of alleged illegal activities in said district, said investigation involves possible violations of Title 18, United States Code, Sections 1951 and 1952.

2. John Daley has appeared before the said grand jury after having been duly served with a subpoena commanding his appearance, and he has asserted his privilege against self-incrimination under the Fifth Amendment to the United States Constitution in response to questions pertinent and material to the investigation of the grand jury.

3. It is my judgment as United States Attorney for the Northern District of Illinois that the testimony of John Daley in regard to the above-described investigation before the said grand jury is necessary to the public interest, as in the production of books, papers or other evidence he may have in his possession

or control. Therefore, I have sought and obtained approval from the designated representative of the Attorney General of the United States to make application to this Court that John Daley be instructed by the Court to testify and produce evidence before the grand jury, all in accordance with the terms and provisions of Title 18, United States Code, Sections 6002 and 6003. A copy of a letter from the Assistant Attorney General of the Criminal Division, Department of Justice, setting out the above-mentioned approval, is attached to this petition.

WHEREFORE, the petitioner prays the Court enter an order instructing John Daley to return forthwith to the said grand jury to testify and produce evidence before the grand jury, subject to the provisions of 18 U. S. C. 6002—that no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against him in any criminal case, administrative proceeding, disciplinary committee, any bar association or state Supreme Court, in conjunction with any professional disciplinary proceeding or disbarment, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Respectfully submitted,

JAMES R. THOMPSON
United States Attorney

ARV:FAF:gs

Exhibit E

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

IN RE: JOHN DALEY,
A WITNESS BEFORE THE
SPECIAL MARCH 1974 GRAND JURY } 71 GJ 3567

ORDER

This matter coming on to be heard on the petition of the United States of America, by James R. Thompson, United States Attorney for the Northern District of Illinois, for an order instructing John Daley to testify and to produce evidence before the Special March 1974 Grand Jury, said John Daley being a witness before the said grand jury who has asserted his privilege against self-incrimination, and the Court having considered said petition of the United States Attorney and the letter approving the application of this Court from the Assistant Attorney General of the Criminal Division, United States Department of Justice, attached to said petition:

IT IS HEREBY ORDERED that John Daley shall not be excused from testifying or from producing books, papers or other evidence before the said grand jury on the ground that the testimony or evidence required of him may tend to incriminate him, and that John Daley shall proceed forthwith to the place of meeting of the said grand jury and answer the questions which he is asked and produce what evidence is required of him without further asserting his privilege against self-incrimination, and IT IS FURTHER ORDERED that no testimony of the witness, John Daley, compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against him in any criminal case, except a prose-

cution for perjury, giving a false statement, or otherwise failing to comply with this order, in accordance with the provisions of Section 6002, Title 18, United States Code.

IT IS FURTHER ORDERED that no testimony of the witness, John Daley, compelled under this order as above, may be used against him in any administrative proceeding, disciplinary committee, any bar association or state Supreme Court, in conjunction with any professional disciplinary proceeding or disbarment.

ENTER:

/s/ EDWIN G. ROBSON
U. S. District Court Judge

Dated at Chicago, Illinois this 18th day of July, 1974.

Exhibit F

UNITED STATES DEPARTMENT OF JUSTICE
United States Attorney
Northern District of Illinois
United States Courthouse
Chicago, Illinois 60604

ARV:pjs

June 2, 1975

Mr. George Murtaugh
Attorney
Coghlan & Joyce
1 North LaSalle Street
Room 515
Chicago, Illinois 60602

Re: *Mr. John Daley*

Dear Mr. Murtaugh:

I am responding to your inquiry as to whether or not your client, Mr. John Daley, is compelled to testify in the oncoming trial, *United States* v. *Charles Bonk*, 75 CR 88, based on the immunity order which was entered by Chief Judge Robson in July of 1974.

It is the understanding of the United States Attorney's Office that that order compels your client, Mr. Daley, to appear and testify in judicial proceedings which grow out of the grand jury action, 71 GJ 3567. The United States Attorney's Office takes the position that your client's failure to appear and testify as required would be a direct violation of the court order entered by Judge Robson and subject him to penalties for contempt.

It is, of course, understood that the immunity order which Judge Robson entered forbid the use of this compelled testimony as set out in the immunity granted as entered by Judge Robson.

If you have any further questions about this matter, please do not hesitate to contact me.

Very truly yours,

/s/ JAMES R. THOMPSON
James R. Thompson
United States Attorney

Exhibit G

Chicago
July 29, 1975
File No. 75-CI-586

Mr. John M. Daley
69 West Washington Street
Suite 2300
Chicago, Illinois 60602

Dear Mr. Daley:

The attention of this office has been directed to your testimony in the recent trial of *U. S.* v. *Bonk*, 75 CR 88. You testified to acts by you which if true would constitute unprofessional conduct.

Please send me a letter setting forth all material facts related to your above described testimony. Your response is requested within 10 days. Thank you for your cooperation.

Very truly yours,

JOHN C. O'MALLEY
Counsel

JCO'M:bc
cc: William Martin

Exhibit H

Law Offices
WILLIAM J. MARTIN, LTD.
Suite 1200
33 North Dearborn Street
Chicago, Illinois 60602

Area Code 312
Telephone 641-1466

September 22, 1975

Mr. John O'Malley
Counsel
Attorney Registration and Disciplinary
Commission of the Supreme Court
of Illinois
203 North Wabash Avenue
Chicago, Illinois 60601

Re: John M. Daley
File No. 75-CI-586

Dear Mr. O'Malley:

Please be advised that George J. Murtaugh and the undersigned represent John M. Daley with respect to the matters raised in your letter to Mr. Daley dated July 29, 1975.

Your letter dated July 29, 1975, contains the following statement:

> "The attention of this office has been directed to your testimony in the recent trial of *U.S.* v. *Bonk*, 75 CR 88. You testified to acts by you which if true would constitute unprofessional conduct."

We wish to inform you that the testimony given by Mr. Daley in the *Bonk* trial was the subject of a grant of immunity which

precludes the direct or derivative use of that testimony in any disciplinary proceedings. In July 1974 James R. Thompson, United States Attorney for the Northern District of Illinois, presented a Petition for an order granting immunity to Chief Judge Edwin Robson of the United States District Court. The United States Attorney made the following specific request in that Petition:

> "WHEREFORE, the petitioner prays the Court enter an order instructing John Daley to return forthwith to the said grand jury to testify and produce evidence before the said grand jury, subject to the provisions of 18 U. S. C. 6002—that no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against him in any criminal case, administrative proceeding, disciplinary committee, any bar association or state Supreme Court, in conjunction with any professional disciplinary proceeding or disbarment, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." (Exhibit A, Attached)

The Petition for the immunity order was supported by a letter of approval from Henry E. Petersen of the Department of Justice who wrote the following on or about June 25, 1974:

> "Your request for authority to apply to the United States District Court for the Northern District of Illinois for an order or orders requiring John Daley to give testimony or provide other information pursuant to 18 U. S. C. 6002-6003 in the above matter *and in any further proceedings resulting therefrom or ancillary thereto* is hereby approved pursuant to the authority vested in me by 18 U. S. C. 6002-6003 and 28 C. F. R. 0.175." (Exhibit B, Attached) (Emphasis Added)

Subsequent to the presentation of the United States Attorney's Petition supported by the Petersen letter of approval, Chief Judge Robson entered an order granting immunity to Mr. Daley. The following specific provision is contained in Judge Robson's order:

> "IT IS FURTHER ORDERED that no testimony of the witness, John Daley, compelled under this order as above, may be used against him in any administrative proceeding, disciplinary committee, any bar association or state Supreme Court, in conjunction with any professional disciplinary proceeding or disbarment." (Exhibit C, Attached)

The provisions of the immunity order entered by Judge Robson fully extended through Mr. Daley's testimony during the trial of *United States* v. *Bonk*, 75 CR 88. (Letter of James R. Thompson to George Murtaugh dated June 2, 1975; Exhibit D, Attached.)

It appears that your request of July 29, 1975, to Mr. Daley is premised upon the Disciplinary Commission's direct or derivative use of his immunized testimony. If this is the case, Judge Robson's order clearly forbids any use of Mr. Daley's testimony in a proceeding before a disciplinary committee. Therefore, the purpose of this letter is to place you on formal notice regarding the immunized status of Mr. Daley's grand jury and trial testimony in the *Bonk* matter and the fact that it cannot be used in proceedings before the Disciplinary Commission.

Based upon the foregoing, we respectfully suggest that the inquiry commenced in your letter of July 29, 1975 be terminated.

Very truly yours,

/s/ WILLIAM J. MARTIN
William J. Martin

WJM:em
Encs. (4)

Exhibit 1

BEFORE THE INQUIRY BOARD
OF THE ATTORNEY DISCIPLINARY SYSTEM

In the Matter of:
JOHN M. DALEY, *Attorney.* } No. 75-CI-586

MOTION TO EXCLUDE DIRECT AND DERIVATIVE USE OF COMPELLED TESTIMONY

Now comes the Respondent, John M. Daley, by his attorney, William J. Martin, and respectfully requests that this Panel of the Inquiry Board of the Attorney Disciplinary System abide by the Order of the Chief Judge of the United States District Court of the Northern District of Illinois entered in July, 1974 prohibiting the use of the compelled testimony of Mr. Daley ". . . against him in any administrative proceeding, disciplinary committee, any bar association, or state Supreme Court in conjunction with any professional disciplinary proceeding or disbarment." The following is stated in support of this Motion:

1. On July 29, 1975, John C. O'Malley, Counsel to the Attorney Disciplinary System, wrote to Respondent, John M. Daley, stating that the attention of his office ". . . has been directed to your testimony in the recent trial of '*U.S.* v. *Bonk*, 75 CR 88.'" (Respondent's Exhibit 1, attached.)

2. On September 22, 1975, William J. Martin, attorney in these proceedings for John M. Daley, wrote to Mr. O'Malley advising him in detail as to the Immunity Order entered by the Chief Judge of the District Court for the Northern District of Illinois prohibiting the direct and derivative use of Mr. Daley's compelled testimony in any disciplinary proceedings. The William J. Martin letter dated September 22, 1975 is attached hereto as Respondent's Exhibit 2 and the attachments to that letter are

further attached as the following Respondent's Exhibits in support of this Motion:

Exhibit A—United States Attorney's Petition for Order of Immunity In re: John Daley 71 GJ 3567.

Exhibit B—Department of Justice letter of authorization by Assistant Attorney General Henry E. Peterson conferring authority for the Petition for an Order of Immunity.

Exhibit C—Order of Immunity entered by United States District Judge Edwin Robson in July, 1974.

Exhibit D—Letter dated June 2, 1975 by United States Attorney James R. Thompson to Mr. Daley's attorney, George Murtaugh advising him that the Immunity Order entered by Judge Robson extends to the trial entitled *United States* v. *Bonk*, 75 CR 88.

3. The provision excluding the use of Mr. Daley's compelled testimony in disciplinary proceedings was placed in the Petition and Order of Immunity solely at the request of the United States Attorney's office because of its concern due to prior incidents that pressures would be placed upon Mr. Daley by threat of administrative action. Moreover, the United States Attorney's office informed Mr. Daley and/or Mr. Murtaugh that it was the opinion of that office that Mr. Daley's compelled testimony could not be used against him in disciplinary proceedings. (See Respondent's Exhibit 3, Affidavit by First Assistant United States Attorney Anton R. Valukas, dated February 13, 1976.)

4. Chief Judge Edwin Robson was made fully aware of all the provisions of the Petition for Immunity before he signed the Immunity Order. (Respondent's Exhibit 3, page 3.)

5. Prior to testifying before the Federal Grand Jury in regard to the *Bonk* matter, Mr. Daley was fully advised of the position of the United States Attorney and the Chief Judge of the United States District Court for the Northern District of Illinois that he could choose to testify without any concern that his compelled testimony would be used against him in any disciplinary pro-

ceeding. Thereupon, Mr. Daley in reliance on these clear statements of authority chose to give the testimony which the Attorney Disciplinary System now seeks to use against him in a disciplinary proceeding. The Affidavit of Attorney George Murtaugh, Exhibit 4, attached, sets forth in detail additional circumstances surrounding the Immunity Order and Mr. Daley's reliance upon the provision excluding the use of the direct and derivative use of his compelled testimony in a disciplinary proceeding prior to making his decision to appear as a witness before the Federal Grand Jury and at the trial of Charles Bonk.

WHEREFORE, the Respondent, John M. Daley, requests that this Inquiry Panel exclude the direct and derivative use of his compelled testimony in the *Bonk* trial against him in these proceedings. And, in view of the fact that the Administrator's letter dated July 29, 1975 (Exhibit I) refers only to this testimony as the basis for inquiry, it is further requested that this Panel dismiss these proceedings.

Respectfully submitted,

/s/ WILLIAM J. MARTIN
William J. Martin,
Attorney for Respondent
John M. Daley

WILLIAM J. MARTIN
WILLIAM J. MARTIN, LTD.
33 North Dearborn Street
Suite 1200
Chicago, Illinois 60602
641-1466

Exhibit J

BEFORE THE INQUIRY BOARD
OF THE ATTORNEY DISCIPLINARY SYSTEM

In the Matter of:
JOHN M. DALEY, *Attorney* } No. 75-CI-586
Inquiry Panel D

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXCLUDE DIRECT AND DERIVATIVE USE OF COMPELLED TESTIMONY

A. *Background of Proceedings*

In connection with proceedings before a Federal Grand Jury in the Northern District of Illinois, the Chief Judge of United States District Court entered an Order on July 18, 1974 granting the respondent, John M. Daley, immunity under 18 U. S. C. Section 6002. The Order entered by Chief Judge Edwin Robson contained an additional explicit provision which directed that ". . . no testimony of the witness, John Daley, compelled under this Order as above, may be used against him in any administrative proceeding, disciplinary committee, any bar association of state Supreme Court, in conjunction with any professional disciplinary proceedings or disbarment." (Respondent's Exhibit C, p. 2; References to Exhibits in this Memorandum of Law relate to the Exhibits submitted in support of the Respondent's Motion to Exclude Direct and Derivative Use of Compelled Testimony, unless otherwise identified.) Relying upon Judge Robson's Order, Respondent testified before a federal grand jury and again at the trial of Charles Bonk, a Cook County Commissioner charged with extortion and income tax violations.

Subsequent to that testimony, John C. O'Malley, Counsel to the Attorney Disciplinary System, wrote to Mr. Daley on July

29, 1975, stating that the attention of the Disciplinary System ". . . has been directed to your testimony in the recent trial of '*U.S.* v. *Bonk*, 75 CR 88.'" (Respondent's Exhibit 1.) On September 22, 1975, William J. Martin, attorney in these proceedings for John M. Daley, wrote to Mr. O'Malley advising him in detail as to the Immunity Order entered by the Chief Judge of the District Court prohibiting the direct and derivative use of Mr. Daley's compelled testimony in any disciplinary proceedings. Submitted to the Disciplinary System with this letter were exhibits documenting the fact that the Immunity Order was duly authorized, contained the aforestated provision barring the use of the compelled testimony in a disciplinary proceeding, and fully applied to the Respondent's trial testimony as well as his grand jury testimony. (See Exhibits A through D attached to Respondent's Exhibit 2.) The September 22, 1975 letter to Mr. O'Malley indicated that its purpose was to provide ". . . formal notice regarding the immunized status of Mr. Daley's grand jury and trial testimony in the Bonk matter and the fact that it cannot be used in proceedings before the Disciplinary Commission." The letter concluded with the request that the inquiry predicated upon the Bonk testimony be terminated. (Respondent's Exhibit 2, p. 2.)

The Attorney Disciplinary System elected not to respond to this letter but gave notice that proceedings had commenced before Panel D of the Inquiry Board. On February 17, 1976 the Respondent appeared with his attorney before Panel D, at which time he submitted *inter alia* a Motion to Exclude the Direct and Derivative Use of Compelled Testimony. In the course of the discussion regarding this Motion, the Panel requested that Respondent's attorney respond to a memorandum prepared by Mr. O'Malley on June 25, 1975 and submitted to Carl H. Rolewick, the Administrator of the Illinois Disciplinary System, entitled "The Scope of Immunity Pursuant to 18 U. S. C. § 6002." This document had previously been furnished both to the members of Panel D and counsel for respondent. Respondent's objective in reply is three-fold: (1) to respond to the question raised by Panel D regarding its authority to decide this issue; (2) to respond to the O'Malley memorandum insofar as it has any bearing upon this issue; (3) to present positive authority in support of the Respondent's motion to exclude direct and derivative use of compelled testimony.

B. *"Ripeness" and the Propriety of Adjudication at the Inquiry Level.*

During the proceedings on February 17, 1976, a member of Inquiry Panel D, Mr. Arnold B. Kanter, requested that counsel for Respondent address a part of his memorandum to the issue of the authority of Inquiry Panel to decide the Motion to Exclude. (T. 29-30). The pertinent provisions of Supreme Court Rule 753(a) state the following:

> The Inquiry Boards shall inquire into and investigate matters referred to them by the Administrator
>
> * * * * *
>
> After investigation and consideration, the Inquiry Boards shall dispose of matters before them by voting to dismiss the charge, to discontinue an investigation undertaken on their own motion or to file a complaint with the Hearing Board.

The Rules of the Attorney Registration and Disciplinary Commission set forth additional provisions governing the duties of the Inquiry Panel:

> Rule 2.2—*Function and Procedure of Inquiry Panel.* It is the function of the Inquiry Panel to determine whether there is sufficient evidence for the filing of a complaint with the Hearing Board. The Panel should review the investigation made by the Administrator and conduct or direct any additional investigation it feels appropriate. It shall have the authority to require the attendance of witnesses before the Panel, or designated member or members thereof, and subpoenas for this purpose shall be issued by the Clerk of the Court upon request of the Chairman of

> the Panel. However, it is not the function of Inquiry Panels to determine the merits of the case, and their proceedings shall not be conducted as adversary hearings. * * *

Thus, we find that an Inquiry Panel is required to *investigate* and *consider* matters referred to it by the Administrator, is empowered to compel the attendance of witnesses, and may direct the Administrator to conduct whatever additional investigation it deems appropriate. Although the Inquiry Panel is precluded from determining the merits of a case, that question does not arise with the instant Motion: Respondent does not seek a ruling on the issue of whether his conduct as described in his testimony at the *Bonk* trial requires the imposition of discipline. The merits of that question are not even tangentially raised in the Motion to Exclude Direct and Derivative Use of Compelled Testimony. Rather, the question presented here is ". . . whether there is *sufficient evidence* for the filing of a complaint with the Hearing Board." (Rule 2.2) (Emphasis added).

Accordingly, the Inquiry Panel not only can but must investigate the sufficiency of the evidence against Mr. Daley. A determination of that question necessitates a ruling on the effect of the District Court Order forbidding the use of the compelled testimony.

The terms of Judge Robson's Order apply without reservation to ". . . any professional disciplinary proceeding. . . ." (Exhibit C). The instant proceeding at Inquiry represents the first tier of the entire disciplinary structure which lies under the direction of the Illinois Supreme Court. The Robson Order is directed against the use of Respondent's compelled testimony at any level of Illinois disciplinary proceedings. Hence a decision on the Motion to Exclude is ripe for adjudication and this Inquiry Panel is the appropriate agent of the Illinois Supreme Court to determine if Judge Robson's Order will be obeyed or disobeyed.

C. *The Inapplicability of the Administrator's Authorities to the Robson Order.*

Implicit throughout Mr. O'Malley's Memorandum is the assumption that since 18 U. S. C. 6002 *et seq.* allows immunity from the use of compelled testimony in criminal proceedings, it cannot apply to disciplinary matters. The Administrator's theory is bottomed on the premise that a federal District Court judge does not have the authority to enter the Order entered by Judge Robson. However, the cases cited by the Administrator do not deal with an order *specifically* forbidding the use of compelled testimony. For example, *Kastigar* v. *United States*, 406 U. S. 441 (1972) held that transactional immunity is not a constitutional necessity and use immunity is sufficient and *Ullman* v. *United States*, 350 U. S. 422 (1956), held that the 1954 Immunity Act met the requirements of the Fifth Amendment. Neither decision is at issue here.

The respondent in *In re Schwarz*, 51 Ill. 2d 334, 282 N. E. 2d 689 (1972) argued that his Fifth Amendment rights were violated when testimony given under the Illinois immunity statute was used in his disbarment proceeding. However, unlike the present case, no provisions in the *Schwarz* order explicitly forbade use of the testimony in a disciplinary proceeding. For the same reason, *Maryland State Bar Association Inc.* v. *Sugarman*, 273 Md. 306, 327 A. 2d 1 (1974) is not in point because the immunity order involved did not expressly extend to disciplinary proceedings. Indeed, no recorded case concerning the scope of immunity involves federal court orders expressly prohibiting the use of compelled testimony in disciplinary actions.

D. *The United States Attorney and the District Court in Good Faith and in the Interests of Justice.*

As the Affidavits of both Anton R. Valukas, First Assistant United States Attorney (Exhibit 3) and Respondent's attorney, George J. Murtaugh (Exhibit 4), clearly establish, the request

for exclusion of testimony in disciplinary proceedings *was initiated entirely by the Government*. A firm basis existed for the decision of the United States Attorney to obtain protection of immunized testimony from disciplinary proceedings. Other witnesses had been subjected to pressures not to testify or to testify falsely.

> Affiant informed Mr. Murtaugh that the United States Attorney's Office was concerned because of prior incidents that efforts might be made to pressure the witness Daley by threats of administrative action into not testifying or to testifying falsely. The United States Attorney's Office believed that to insure the integrity of the testimony it was necessary to include such a provision. (Exhibit 3, page 2).

Mr. Murtaugh pointed out that: ". . . the United States Attorney's office had experienced in the past and might experience in this particular matter the use of varying pressures such as administrative actions and threats of disciplinary proceedings which might possibly undermine effective investigation and prosecution." (Exhibit 4, page 2).

Judge Robson was fully informed as to the reasons why the Government believed that the interests of justice required the provision now at issue. (Exhibit 3, page 3). Thus legitimate and compelling reasons involving the integrity of federal prosecutions caused the United States Attorney and the Chief Judge of the United States District Court to take action that they did in this case.

E. *The District Court Had Independent and Inherent Authority to Issue the Daley Order.*

Although the District Court Order is predicated in part upon 18 U. S. C. 6002, the provision now in issue further rests upon the independent basis of the inherent power of the Court to effectuate the performance of its duties. Thus the provision relating to disciplinary proceedings is an adjunct to the 18 U. S. C. 6002 order which survives separate and apart from the

issue of the direct applicability of § 6002 to disciplinary proceedings. The inherent power of federal courts to issue orders when needed to perform their functions is found in 28 U. S. C. § 1651—the All Writs Act which provides that: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions. . . ."

Examples of the court's power to issue such orders are numerous. See *F. T. C.* v. *Dean Foods Co.*, 384 U. S. 597 (1964) (power to enjoin merger pending F. T. C. action); *Reid* v. *Prentice Hall, Inc.*, 261 F. 2d 700 (6th Cir. 1958) (power to dismiss case for refusal to accept compromise offer); *Bethlehem Mines Corp.* v. *United Mine Workers*, 494 F. 2d 726 (3rd Cir. 1974) (power to fashion procedure for choosing umpire in labor dispute); *Mississippi Valley Barge Lines Co.* v. *United States*, 273 F. Supp. 1 (E. D. Missouri 1967), aff'd per cur. 389 U. S. 579 (power to set aside I. C. C. Order authorizing transfer of a water carrier certificate); *Faubus* v. *United States*, 254 F. 2d 797 (8th Cir. 1958) (power to enjoin state militia from preventing Negro children from attending public high school); *United States* v. *Wallace*, 218 F. Supp. 290 (N. D. Alabama 1963) (power to enjoin state governor from obstructing federal court integration order).

The argument that the immunity order is unauthorized because it was issued under 18 U. S. C. 6002 thus must fail. As applied to disciplinary proceedings the order was clearly authorized by both the inherent power of the Court and by 28 U. S. C. 1651.

The Illinois disciplinary structure is further required to adhere to Judge Robson's order by virtue of the Supremacy Clause. United States Constitution, Article 6. The Disciplinary System is directed by the Illinois Supreme Court (*Ill. Rev. Stat.* 1975, ch. 110A § 709) and is a state agency. Under the Supremacy Clause, when a state and a federal law are in unavoidable conflict, the state must yield to the federal law. Moreover, once a

federal agency has occupied a given field, state authority in that field must be suspended. See, e.g., *Free* v. *Bland*, 369 U. S. 663 (1962) (Treasury regulations preempt state property law); *Iowa Public Service Co.* v. *Iowa State Commerce Commission*, 8th Cir. 1969), cert. den. 396 U. S. 826 (activities of U. S. Bureau of Reclamation not subject to state regulation or control). Cf. *Public Utilities Commission of State of Calif.* v. *United States*, 355 U. S. 534 (1958); *Testa* v. *Kott*, 330 U. S. 386 (1947); *Tarble's* Case 80 U. S. 397, 13 Wall. 398 (1871).

The doctrines of supremacy and federal preemption also apply to Respondent's testimony in that the testimony is a 'res' or property in which the federal court has a proprietary interest. By his order, Judge Robson has declared the testimony in question to be federal property, which cannot be employed by any state agency. This is neither unreasonable nor unfair since the property would not have come into existence but for the District Court Order. The federal system is not taking something away from Illinois but only retaining that which it properly secured in the first instance. The testimony belongs to the federal courts, and a federal court has ordered that it not be used in a state proceeding. Property of the United States is free from any state interference without prior consent of the federal government. See *United States* v. *Mayo*, 319 U. S. 441 (1942) (seizure by state agents of federally owned fertilizer illegal); *S. R. A. Inc.* v. *State of Minnesota*, 327 U. S. 558 (1947) (state taxation of federal property illegal).

A further effect of the District Court order was to establish an evidentiary ruling barring the use of federally obtained testimony. Since the same rules of evidence apply in disciplinary proceedings as are applied in other cases, the impact of the federal exclusionary ruling should be honored as a matter of evidence in the State's proceedings. Cf. *In re Melin*, 410 Ill. 332, 102 N. E. 2d 332 (1951); *People ex rel. Chicago Bar Assoc.* v. *Amos*, 246 Ill. 299, 92 N. E. 857 (1910).

F. The Equitable Doctrine of Estoppel Operates to Bar the Use of Respondent's Testimony by the Illinois Attorney Disciplinary System.

The factors which give rise to the equitable defense of estoppel involve (1) a representation, (2) good faith reliance upon that representation, and (3) prejudice resulting from that reliance. The representation made to Respondent in the instant case prior to his giving testimony was that the United States Attorney believed that the exclusionary provision in the proposed Immunity Order would prohibit the use of Mr. Daley's testimony in a disciplinary proceeding. This information was communicated to the Respondent with the assurance of his attorney that the representation by the Government could be relied upon. (Affidavit of George J. Murtaugh, Exhibit 4, page 2). Before waiving his privilege against self-incrimination by testifying before the Grand Jury, Respondent relied in good faith upon the Government's representation and, of even greater importance, he relied in good faith upon the authority of the Chief Judge of the District Court whose order expressly informed Respondent that his compelled testimony could not be used in any disciplinary proceedings. The element of reliance is rendered expressed by Mr. Murtaugh's Affidavit:

enofmw

> Before waiving his privilege against self-incrimination by testifying before the Grand Jury, my client informed me that due to the assurances of the United States Attorney's office and the explicit terms of Judge Robson's order regarding the exclusion of his testimony in any disciplinary proceeding, he would rely upon the order and testify. (Exhibit 4, page 3).

We have thus established that the elements of a representation and a good faith reliance upon that representation existed in the case at bar. It is obvious that the element of prejudice resulting from Respondent's good faith reliance upon the order is self-evident. Mr. O'Malley admitted during the proceedings on

February 17, 1976 before this Panel that Mr. Daley's testimony in the *Bonk* case was the only evidence involved in the investigation of his conduct.

An attorney cannot be faulted for relying upon the fact that both the United States Attorney and the Chief Judge of the United States District Court were sufficiently cognizant of their authority so that the order entered in this case could readily be presumed to be valid.

Likewise, Respondent could properly assume that the Illinois Attorney Disciplinary System will obey the express provisions of a federal court order. By its very nature, the Illinois Attorney Disciplinary System represents to the public and to attorneys that it will enforce and obey the law. This must include obedience of an express and unambiguous order from a federal court. Thus the Respondent properly assumed that the Illinois Attorney Disciplinary System as a public agency would act in a law abiding manner by accepting the authority of the District Court. In *Illinois Chiropractic Society* v. *Berns*, 17 Ill. 2d 356, 161 N. E. 2d 334 (1959) a chiropractor who had been enjoined from practice contended that the State Medical Examination Board would discriminate against him in any licensing examination. In ruling against the chiropractor, the Supreme Court held that it must assume that a public agency would act constitutionally and would not discriminate against him.

New-Mark Builders, Inc. v. *City of Aurora*, 90 Ill. App. 2d 98, 233 N. E. 2d 44 (1967) involved a developer who subdivided his property into three parcels, to be developed as a single over-all project. He built improvements on two of the parcels and these were annexed by the city, which had agreed to annex all three parcels. The city refused to annex the third parcel, imposing a condition which had not been part of the original agreement. The court held the city was estopped to deny the annexation:

> If, under all of the circumstances, the affirmative acts of the public body have carried another to certain actions

> which have created a situation where it would be inequitable and unjust to permit the public body to . . . retract what it previously had done, the doctrine of estoppel may be applied against it.

Estoppel was found to be a valid defense in *Hickey* v. *Illinois Central Railroad Company*, 35 Ill. 2d 427, 220 N. E. 2d 415 (1966). The court found that the City of Chicago and State of Illinois had for more than 50 years disclaimed any title to reclaimed land along the lakefront and acted as if the land were owned in fee by the defendant railroad. Also, the railroad had executed leases and conveyances on the assumption that it owned the land. Accordingly, the city and state were held estopped to assert title to the land.

Due to the circumstances which surrounded the Respondent's decision to testify after the entry of the District Court order, it is manifestly apparent that the requirements of the equitable doctrine of estoppel had been fulfilled and that this doctrine operates to preclude the Illinois Attorney Disciplinary System from ignoring the provisions of the order.

Conclusion

Based upon each of the foregoing reasons, it is respectfully submitted that any direct or derivative use of Respondent's compelled testimony in the *Bonk* case at any level of the Illinois Disciplinary System including the present proceedings before the Inquiry Panel D constitutes a direct violation of a federal court order. The constitutional, statutory, decisional, and equitable principles referred to in this memorandum require a decision by the Inquiry Panel that Respondent's compelled federal testimony not be considered in any fashion in the investigation of a complain against the Respondent. In light of the Administrator's statement that the only evidence of possible improper conduct in the instant case arises from the Respondent's *Bonk* testimony, this Panel properly should grant the Respondent's motion to

exclude any use of the compelled testimony and dismiss these proceedings pursuant to its general power to investigate this matter and to dismiss a complaint due to the insufficiency of the evidence.

Respectfully submitted,

/s/ WILLIAM J. MARTIN
William J. Martin
Attorney for John M. Daley

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33 North Dearborn Street
Suite 1200
Chicago, Illinois 60602
641-1466

Exhibit K

STATE OF ILLINOIS } ss.
COUNTY OF COOK }

BEFORE THE INQUIRY BOARD OF THE
ATTORNEY DISCIPLINARY SYSTEM.

In the Matter of:
JOHN M. DALEY,
An Attorney. } No. 75-C1-586

TRANSCRIPT OF PROCEEDINGS, had at the hearing of the above entitled cause, at Room 1900, 203 North Wabash Avenue, Chicago, Illinois on Tuesday, February 17th, A. D. 1976, at the hour of 4:00 o'clock P. M.

Present:

Mr. Daniel J. Ahern, Chairman;

Mr. Arthur M. Scheller, Jr., Member;

Mr. Arnold B. Kanter, Member;

Mr. John O'Malley, appeared on behalf of the Inquiry Board of the Attorney Disciplinary System;

Mr. William J. Martin, appeared on behalf of the Respondent, John M. Daley.

Also Present: Mr. Jack Toporek and Mr. John M. Daley.

[2] Chairman Ahern: Okay. Let me introduce ourselves to you first before we start. This is the—it's a rather long name, but this is the Attorney Registration and Disciplinary System, and we are the Inquiry Panel "D". I am Dan J. Ahern. This is Mr. Scheller, Mr. Arthur M. Scheller, Jr., and this is Mr. Arnold B. Kanter; then Mr. John O'Malley and your name, sir?

Mr. Toporek: Jack Toporek.

Chairman Ahern: —and Mr. Jack Toporek.

Mr. O'Malley: He's appearing with me, Mr. Chairman.

Chairman Ahern: Did you say "John" or Jack? Excuse me.

Mr. Toporek: Jack.

Mr. Scheller, Jr: Jack.

Chairman Ahern: John?

Mr. Toporek: No, Jack. It's Jack Toporek, T-O-P-O-R-E-K.

Chairman Ahern: Oh, Jack Toporek–

Mr. Toporek: Correct.

Chairman Ahern: All right. I see.

Now, I understand that we are [3] having a court reporter both at your request, Mr. Martin, and Mr. O'Malley's request?

Mr. Martin: That is correct.

Chairman Ahern: All right.

Mr. Martin: For the record, Mr. Chairman,—

Chairman Ahern: Yes, sir.

Mr. Martin: —my name is William J. Martin. I am appearing here as the attorney for the Respondent, John M. Daley, who is also here present.

Chairman Ahern: All right. I understand also from talking to Mr. O'Malley that before we proceeded that you intended to make a motion in this case?

Mr. Martin: That is correct, Mr. Chairman.

Chairman Ahern: Very well. You may make it now then.

Mr. Martin: If I may, I have two motions to make with the Panel's permission.

Chairman Ahern: Yes, sir.

Mr. Martin: I will serve a copy upon each of you, Mr. Chairman and you members, if I may?

Chairman Ahern: All right.

(Said document tendered to Chairman Ahern [4] and to the two panel members, Mr. Scheller, Jr. and Mr. Kanter)

Chairman Ahern: Mr. Martin,—

Mr. Martin: Yes, sir.

Chairman Ahern: —it's a rather lengthy motion, at least the first one you have handed us.

Mr. Martin: Yes, sir.

Chairman Ahern: Would you prefer to orally disclose this moiton or do you want us to take time out now to read it?

Mr. Martin: Well, I—

Chairman Ahern: Whichever you prefer to do.

Mr. Martin: Well, I think, Mr. Chairman, that the motion itself is two and a half pages and the balance of it are exhibits in support thereof, and I think you may find it more helpful just to read the motion.

Chairman Ahern: All right. Very well. I think we can read it then.

Mr. Martin: Yes.

Chairman Ahern: All right. You have two motions, Mr. Martin.

[5] Mr. Martin: Yes.

Chairman Ahern: Insofar as the—it may be beyond my power and authority for me to say this because I may say it without regard to your second motion that you have presented; that is, the motion to preserve the privacy and confidentiality of these disciplinary proceedings.

Mr. Martin: Yes, sir.

Chairman Ahern: That certainly is granted. It's like combatting the wind in terms of the newspaper articles that you have got attached, you know, this source that is mentioned. I don't know whoever the source is violated anything of a confidential nature. It's somewhat of a dilemma, I think, as far as the public is concerned—and we are all attorneys here—to say for the benefit of the public that the Commission would not at least look into any impropriety which would, perhaps, do an injustice or a disservice to our function.

However, by the same token from the article which I haven't seen until you just presented it here today, it certainly doesn't accuse your client or Mr. Haskins, I don't think, [6] merely to say an inquiry has been made. I don't know who the source is, but these—these proceedings are confidential. There was no proceeding pending, I assume, when this was written.

Mr. Martin: Under normal circumstances, Mr. Chairman, it would be my position that in view of the Supreme Court Rule 766, it's not even necessary to make such a motion unless a Respondent—the Respondent deems it appropriate at his request that the proceedings be made public; otherwise, it's assumed that they will be maintained under a confidential basis.

But it was my concern in light of the substance and certain of the comments which may truthfully have been attributed to the Commission source or may not, in fact, come from the Commission per se, I would go on the record at the earliest possible date to maintain our desire to hold these proceedings in line with the Supreme Court Rule and that is on a totally private and confidential basis.

I would suggest that the Commission source went further even than simply [7] identifying the fact that an investigation would be made which I even submit is not contemplated under the rule; that is, I don't believe the Commission can announce that they are going to investigate whether a given attorney's conduct was proper or not.

But be that as it may, I think the source went quite a bit further in making a comment on the merits to the effect that the source didn't see how the District Court could infer immunity. And I think that referring to the accusation that Mr. Daley testified to paying bribes when, in fact, the government's case was—had charged extortion against Mr. Bonk, our comments directed to the merits which certainly are in contravention of the privacy, dictate under Rule 766.

So I think your statement—obviously there is nothing we can do about the article solely appearing, but your ruling that the—that these proceedings hence forth will be maintained in confidence, I would be certain that Mr. O'Malley and the members of the Commission staff would certainly follow in good faith and that there [8] would be no further comments made publicly along these lines about these proceedings. Is that fair?

Mr. O'Malley: That is my position.

Mr. Scheller, Jr.: Yes; I would like to have a statement from Mr. O'Malley in regard to the second motion, if you wish to make any at this time.

Mr. O'Malley: Which motion is that?

Mr. Martin: That would be the motion to preserve the privacy and confidentiality of the Disciplinary Proceedings.

Mr. O'Malley: Oh.

Mr. Scheller, Jr.: Correct.

Mr. Martin: If you have any observation as to that?

Mr. O'Malley: I have no question with Mr. Martin that that is the rule that we operate under and shall abide by.

Mr. Martin: Fine.

Mr. O'Malley: We shall operate under it and follow that rule.

Chairman Ahern: Very well.

Mr. O'Malley: As to Mr. Martin's motion, I have no knowledge of the matters which came be- [9] fore, but as to my conduct of this case, I assure you that as far as these proceedings before this Board or any Board herein, I would conduct myself pursuant to that rule.

Chairman Ahern: You see, the matter came before the Commission, I believe, because of newspaper publicity which, of course, the public read newspapers.

Mr. O'Malley: Yes.

Chairman Ahern: If the public feel that there is an impropriety and that that impropriety would be put before this body, then I will agree with you that the source quoted, if there was a source here, went too far, perhaps. But if a newspaper individual were to ask someone at this body "Is this body looking into the matter?", it's a dilemma as to whether or not for the benefit of the public it shouldn't be answered. It's being looked into.

Nonetheless, your motion, I think, is well taken and that these proceedings are confidential.

Mr. Scheller, Jr.: Do you have any speci- [10] fic suggestions, Mr. Martin, that you had in mind in reference to your request

that this Inquiry Panel take whatever measures are necessary to assure the integrity, privacy and et cetera? I mean, did you have anything specifically in mind now?

Mr. Martin: I believe that Chairman's statement that it's ordered by this Panel that these proceedings will be maintained confidential and in private in light of Mr. O'Malley's response, neither he nor I and I assume no other member of the Commission would do anything to violate that order, and it would be sufficient at this time, I am sure.

Mr. Scheller, Jr.: Okay.

Chairman Ahern: Fine.

Now, as to the first motion, your first motion, I presume you wanted to be heard on that?

Mr. Martin: Yes, sir. I don't see any need to read or repeat what we have set forth in the motion which—it's been entitled "A Motion to Exclude Direct and Derivative Use of Compelled Testimony" except to say that, to the best of [11] my knowledge, but for the fact that compel testimony—compelled testimony was obtained presumably by the Administrator of the Disciplinary System and tendered through this Panel, we would not be here today. That is to say that, to the best of my knowledge, there is no other basis for an inquiry except whatever basis purportedly may be contained in Mr. Daley's own testimony or the derivative results of that testimony in a federal trial known as United States versus Bonk.

Now, to back up from this point, it is our position that this system and beginning with the inquiry of this Panel despite its authority to investigate whatever it deems appropriate regarding the conduct of any attorney licensed in this State, has been specifically prohibited from considering the direct use or the derivative use of the compelled testimony of Mr. Daley in that trial and, as a predecessor to that, his compelled testimony before a Grand Jury.

The purpose of my letter of September 22nd, 1975 to Mr. O'Malley, among other things, was to obtain a statement from the counsel [12] for the Disciplinary System that the only evi-

dence which justified these proceedings came either directly or indirectly from Mr. Daley's compelled testimony. It went unanswered, and we find ourselves now here today.

Certainly if there is a basis for this inquiry which does not relate to that testimony or its roots, then we stand ready to proceed with whatever inquiries there may be. However, if the only basis for the inquiry is that testimony or anything that results from the testimony, it seems rather clear to me that the Chief Judge of the United States District Court and the United States Attorney for the Northern District of Illinois prior to the time that Mr. Daley ever made a decision through—to testify before anybody regarding the activities which are the subject of this inquiry, that he was assured by that Court and by the United States Attorney that they properly have the authority to enter an order prohibiting the use of his immunized testimony and is the very type of proceedings that the Commission seeks to commence today.

[13] I think the order is eminently clear in its specific statement that the immunized testimony cannot be used in disciplinary proceedings. I think it is equally important that an attorney can certainly assume to rely upon the authority of the Chief Judge of the United States District Court when that Judge tells him that your testimony cannot be used against you in the Disciplinary System, and it's important to know that that is prior to the time that the Respondent here made any statement whatsoever.

And as the affidavit of his attorney at that time, George J. Murtaugh, states, it was upon the statements by the United States Attorney and the statement by the United States Chief District Judge that caused this Respondent to reach the decision that he would testify, and certainly there were other options opened to him at that time.

So our position is that in reliance upon that judicial authority, I think it's quite clear that an attorney has a right to rely upon a judicial order, that at that point [14] based upon that reliance,

Mr. Daley chose to speak and speak truthfully, and his testimony was used by the government in a situation in which he was not a Defendant but that he was in the government's indictment and prove the victim of an extortion.

Now, it seems rather strange to me that these proceedings would commence in light of the fact that a judicial order has been issued from an obviously competent tribunal prohibiting the use of that testimony.

So before we could proceed further with any aspect of these inquiries, I respectfully ask that this Panel consider the motion to exclude that immunized testimony; and certainly it is my view that should it be excluded, that would terminate the proceedings since I don't believe there is any other basis for inquiry here, and that is the threshold question that is before us today, to determine if this Panel will abide by the order of Chief Judge Robson which clearly is not ambiguous at all. It states that that testimony may not be used and that is our position, Mr. Chairman, that it may not be used. And therefore, before we [15] can conceivably do anything else, I think we are within our appropriate rights and request—in requesting a ruling on this motion.

Chairman Ahern: All right. I have a question that, perhaps, is so fundamental to me that you might not understand it, but I think you will in any event.

Mr. Martin: Yes, sir.

Chairman Ahern: I take it, your position is limited to excluding Mr. Daley's testimony or any derivation of it rather than being a motion to stay these proceedings?

Mr. Martin: Yes, sir.

Chairman Ahern: Is that correct? Do I understand that to be your position?

Mr. Martin: That is correct. I think that it is only proper that we make this Panel aware of Judge Robson's order and ask this Panel to abide by that order. That is essentially what I'm saying.

Chairman Ahern: Okay.

Mr. Martin: And I think the first logical opportunity to have a ruling made on the order is [16] before this Panel.

Chairman Ahern: In other words, stating it differently, it is not your motion or it is not your argument, I should say, that the order entered by Judge Robson would prevent this Panel from proceeding?

Mr. Martin: Well, my argument, Mr. Chairman, is that Judge Robson's order does prevent the use of the compelled testimony directly or indirectly, but it certainly could not prohibit an inquiry based upon any other evidence that may be available to this Panel which does not fall from the compelled—flow from the compelled testimony.

Chairman Ahern: Well, is it your position then that the immunity order would preclude this body from proceeding at all?

Mr. Martin: No.

Chairman Ahern: Is that what you're saying?

Mr. Martin: What I'm saying is that if there is an independent basis for proceedings to be commenced, there is certainly nothing in the District Court order that would prohibit this Panel [17] from continuing its inquiry. But insofar as the inquiry is based upon the use of compelled testimony, either directly or indirectly, then it's an order that simply prohibits the use of that evidence and it doesn't prohibit anything further than that.

Chairman Ahern: All right. Then I would take it that it also is your intention, although you haven't stated it at this point, to advise Mr. Daley not to testify in this regard to testimony that was compelled?

Mr. Martin: It's my position that until we have a ruling on the exclusion of the compelled testimony, any further action on your part in conjunction with the merits of the inquiry could conceivably constitute a waiver, and therefore, I feel that in order to competently advise Mr. Daley, that we should not proceed on the merits in light of the fact that the merits hinge

upon his compelled testimony; at least to the best of my knowledge today, they do.

Chairman Ahern: Of course, you realize that whether or not there is merit with such an [18] inquiry, it really isn't determined until the inquiry is over?

Mr. Martin: Yes.

Chairman Ahern: You realize that?

Mr. Martin: (Nodding Yes)

Chairman Ahern: I mean, this is only an Inquiry Panel now.

Mr. Martin: I understand your point perfectly well, Mr. Chairman.

Chairman Ahern: Yes.

Mr. Martin: I am aware of what you're saying and I do understand it.

Chairman Ahern: Okay.

Mr. Martin: But I am very concerned that at the first available instance, we urge the validity of Judge Robson's order and take whatever measures are necessary to seek its enforcement without going beyond that order in considering even for purposes of inquiry the question of whether or not a hearing should be held on the merits. This is what I'm saying to you now.

Chairman Ahern: Are you familiar with the manner in which the order was obtained, the immun- [19] ity order?

Mr. Martin: To the extent that I reviewed the Murtaugh and Valukas affidavits, yes.

Chairman Ahern: All right. Very well.

Now, do you know whether or not that order was entered on the basis of an extended discussion with Judge Robson or is it something that is given an automatic stamp of approval?

Mr. Martin: It's my understanding from the language of Mr. Valukas' affidavit and also in discussion with him in requesting that affidavit, that Judge Robson was made fully aware of this specific provision.

In other words, it was not just an order handed to him which he signed in essence as a form order. I think it's clear from

Mr. Valukas' affidavit—and I will state from his statements to me beyond the affidavit—that Judge Robson was specifically aware of the provision regarding the prohibition of Mr. Daley's testimony in these times of the proceedings. And as Mr. Valukas points out, the suggestion that that provision be contained. It was not requested by Mr. Daley and it was not [20] negotiated by him, but it was in effect insisted upon by the United States Attorney in view of the fact that he was concerned as to the threats of disciplinary action would be used against the public interest to have a witness, perhaps, refuse to testify at all and suffer whatever penalties may flow from a contempt citation than to testify truthfully before a Grand Jury.

So the United States Attorney initiated this particular provision and made the Chief Judge fully aware of why it should be in this order that there were matters within the public interest and the enforcement of the criminal law by the United States Attorney that required this provision; and this, I think as it's set out in the Valukas affidavit, pretty clearly sets that forth.

Chairman Ahern: All right.

Do you have any cases that you could cite for us which would back up or bolster the position that you take?

Mr. Martin: Well, my initial position, Mr. Chairman, is that with an order by the Chief Judge [21] of the United States District Court, I think that that in itself is binding upon this Panel. Just as Mr. Daley relied upon that in making his decision to testify, I think that this Panel certainly can rely upon the authority of the District Court Judge in declaring that testimony gathered from a Federal Grand Jury investigation pursuant to an order and petition that were presented to him, is sufficient authority to bar the use of that evidence and the disciplinary proceedings.

Chairman Ahern: All right. Are there any cases that speak for that point that you are aware of?

Mr. Martin: There are cases that I am aware of and Mr. O'Malley was kind enough to provide me with a memo-

randum of law that he prepared in connection with this issue, and it is my position that first of all, I believe that the order is valid, number one, because of the inherent authority of the District Court Judge in the particular circumstances of this case faced with the petition by the United States Attorney in his view that threats had been made in other similar situations to wit-
[22] nesses to keep them from testifying; that in view of those particular and unique circumstances, it was within his authority to enter the order that he did.

And my second view is that regardless of a decision on the merits of whether or not you have the naked language of the immunity, the Federal Immunity Statute would go as far as this order went; that is to say, we have a situation, an equitable situation, I might add, where the Respondent in good faith relied upon the representations made to him by the Chief Federal Law Enforcement Officer of this District and it's—and as Chief Judge before he testified.

I think equitable doctrines of reliance or, if you will, estoppel would apply to a situation where a lawyer is told, "You may rely upon our authority in this judicial order when you make your decision whether or not you want to testify or, perhaps, whether or not you wish to remain silent in these proceedings and face a possible contempt citation."

I think the cases that I am aware [23] of and the cases that Mr. O'Malley has been—has set forth in his memorandum do not deal with the precise facts that we have here. They certainly do not deal with the doctrine of reliance.

Certainly there is no way Mr. Daley can roll back the clock and say that, "I may make a different decision now in terms of collecting—of electing to testify or not to testify even though I am—I have been granted immunity."

So that is basically what I'm saying now and that is basically my position, and I think that this is a unique case and that the cases that are available in this area do not go to the issue of the case that arises in this very specific factual framework.

Chairman Ahern: Art, do you have something to say?

Mr. Scheller, Jr: No.

(Here follows a discussion off the record between Mr. Scheller, Jr. and Chairman Ahern)

Chairman Ahern: Mr. O'Malley gave you some citations in a memorandum, is that correct?

Mr. Martin: He did.

[24] Chairman Ahern: Is that correct?

Mr. Martin: Yes, sir.

Chairman Ahern: Is that the same memorandum that we got, John?

Mr. O'Malley: Yes, I believe so.

Mr. Kanter: Dated when?

Mr. Scheller, Jr: Yes, what's the date of it?

Chairman Ahern: Pardon?

Mr. Kanter: Is it dated?

Mr. Scheller, Jr: Let's get the date of it.

Chairman Ahern: Oh. Yes, it is dated.

(Said document tendered to Chairman Ahern)

Chairman Ahern: It's dated June 25th, 1975.

Mr. O'Malley: That is the memorandum I gave to Mr. Martin.

Mr. Martin: I would assume it is, that's it's the same one he gave me.

Chairman Ahern: That is what you furnished to Mr. Martin, and you gave him a copy of that, is that correct?

Mr. Martin: Yes.

Mr. O'Malley: That is correct.

Chairman Ahern: All right.

[25] Mr. Martin: It is.

Chairman Ahern: That's what I thought.

Mr. Martin: Yes, sir. That is the same memorandum I have.

Chairman Ahern: All right.

Now, did you reply to that by way of—

Mr. Martin: This was an inter-office memorandum that I didn't think—

Chairman Ahern: —a written response, or what?

Mr. O'Malley: Mr. Chairman?

Mr. Martin: —at that point needed or indicated a need for reply.

Chairman Ahern: Well, would you care to?

Mr. Martin: If the Panel wishes to have a memorandum which, I take it, would be directed towards this specific issue as I have urged in this proceeding, yes, I would.

Chairman Ahern: I think—I, myself, think it would be adviseable.

Mr. Martin: I would be happy to comply.

Chairman Ahern: Arnold, do you have any questions?

[26] Mr. Kanter: No. I think we ought to recess and discuss this for a few minutes ourselves, if that is agreeable with you.

Mr. Martin: Certainly.

Mr. O'Malley: Yes.

Chairman Ahern: Fine.

Mr. Kanter: And then we can have you come back as soon as we're finished.

Mr. Martin: All right.

Mr. O'Malley: You will call us in when you're ready?

Mr. Kanter: Yes.

Chairman Ahern: All right. Let's do that and we'll let you know as soon as we're through.

Mr. Martin: Thank you.

(After a short recess, the following proceedings were then and there had:)

Chairman Ahern: Mr. Martin, after a rather extended discussion with regard to your motion to exclude direct and derivative use of compelled testimony, we are going to take that under advisement. We would appreciate it if you would be willing to respond to Mr. O'Malley's memorandum of law that he [27] furnished you with.

Mr. Martin: Yes, sir.

Chairman Ahern: We will thereafter set another hearing date on this matter, and Mr. O'Malley, we'd appreciate it if you

would, perhaps, at the next hearing date, advise us to whether or not there are other matters upon which this inquiry is based in addition to testimony of Mr. Daley.

Mr. O'Malley: Yes, sir.

Chairman Ahern: You don't certainly have to do that now, but—

Mr. O'Malley: I would be prepared to do it now.

Chairman Ahern: —but that is up to you.

Mr. O'Malley: Yes, sir. I can do that now.

Chairman Ahern: All right. Do you wish to do it now?

Mr. O'Malley: Yes. I would be most interested in a memo from Mr. Martin. I would assume that my memo addressed to Carl Rolewick as it is would be sufficient formally since he has a copy of it. We have no basis other than the testimony of Mr. Daley in the Bonk Trial to submit to you. So I [28] don't think I need to really advise you of that at this point.

Chairman Ahern: Okay. Fine.

Well then, we will conclude today's hearing, Mr. Martin. How much time would you feel that you would need to respond to Mr. O'Malley's memorandum?

Mr. Martin: Oh, about twenty (20) days. Would twenty (20) days be sufficient?

Chairman Ahern: That would be fine.

Mr. Martin: Okay. That is good.

Mr. O'Malley: That's fine with me.

Chairman Ahern: That is good. Thank you.

Mr. Martin: Mr. Chairman, I would submit my four copies to Mr. O'Malley for distribution to the members of the Panel.

Chairman Ahern: That would be fine.

Mr. Martin: And we will be notified of another date, I take it?

Chairman Ahern: In advance of it, of course, yes.

Mr. Martin: Thank you.

Chairman Ahern: We do have another hearing [29] date I know set for March 25th, but I really don't know how many

matters are on it at that time. We meet, by and large, once a month.

Mr. Martin: All right. Thank you.

Chairman Ahern: So if we could fit it in at that time, it will be set at that time; otherwise, we will have to put it over to another date.

Do you have something you want to say, Arnold?

Mr. Kanter: Yes. Can we go off the record a moment?

Chairman Ahern: Yes, off the record.

(Here follows a discussion off the record among the members of the Inquiry Panel)

Mr. Kanter: The fact that you are making the motion to us assumes, I guess, that we have authority to grant a motion like that. Would you address yourself as well to that question in the memorandum that you submit whether this body is the appropriate body to decide that issue?

Mr. Martin: Yes, sir.

Mr. Kanter: And, indeed, whether we have authority to direct your attention to—I direct your [30] attention to Supreme Court Rule 753(a) which says in part:

> "The Inquiry Boards shall inquire into and investigate matters referred to them by the Administrator."

Mr. Martin: All right. Yes, sir.

Chairman Ahern: Thank you, gentlemen.

Mr. Martin: Thank you.

Mr. O'Malley: Thank you, Mr. Chairman.

Chairman Ahern: That concludes the hearing for today then.

(Whereupon the hearing of this matter was adjourned and continued Sine Die.)

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

I, Sherwin J. Polinsky, do hereby certify that I am a court reporter doing business in the City of Chicago, County of Cook and State of Illinois, and that I reported in shorthand the proceedings had at the hearing of said cause, and that the foregoing is a true and correct transcript of my shorthand notes so taken as aforesaid, and contains all of the proceedings had at said hearing.

/s/ SHERWIN J. POLINSKY

Subscribed and Sworn to before me this 15th day of March, A.D. 1976.

/s/ (Illegible)

(SEAL) *Notary Public*

Exhibit L

STATE OF ILLINOIS } ss.
COUNTY OF COOK }

BEFORE THE INQUIRY BOARD OF THE
ATTORNEY DISCIPLINARY SYSTEM.

In the Matter of:

JOHN M. DALEY, *An Attorney.* } No. 75-C1-586

Parties Met Pursuant to Adjournment, at the hearing of the above entitled cause, at Room 1900, 203 North Wabash Avenue, Chicago, Illinois, on Friday, April 9th, A.D. 1976, at the hour of 2:45 o'clock P.M.

Present:

Mr. Daniel J. Ahern, Chairman;

Mr. Arthur M. Scheller, Jr., Member;

Mr. Arnold B. Kanter, Member;

Mr. John O'Malley, appeared on behalf of the Inquiry Board of the Attorney Disciplinary System;

Mr. William J. Martin, appeared on behalf of the Respondent, John M. Daley.

Also Present: Mr. Jack Toporek and Mr. John M. Daley.

[33] Chairman Ahern: Okay. Let the record show that this is a continuation of the hearing that originally started back on February 17th 1976.

For the record, I am Dan Ahern on Panel "D" of the Inquiry Board, and Mr. Arnold Kanter is here also and Mr. Arthur Scheller, Jr., Mr. John O'Malley from the Commission is here and you are Bill Martin?

Mr. Martin: William Martin, yes.

Chairman Ahern: William Martin, yes, who is appearing on behalf of the Respondent, Mr. John Daley, who is also present.

Mr. Martin: Representing the Respondent, yes.

Chairman Ahern: Okay.

Now, when we concluded the last hearing, Mr. Martin, we had asked you to give us a memorandum of the law stating your position on the case in which you have been kind enough to do.

Mr. Martin: Yes.

Chairman Ahern: Essentially that was a memorandum—that essentially was a memorandum going toward whether or not one of the motions that you [34] had presented to this Panel which was to suppress the testimony of Mr. Daley should be granted.

Mr. Martin: Correct.

Chairman Ahern: Well, we had discussed this matter. I would simply state that while we did not for the same reasons agree or conclude, we did, nonetheless, conclude that we would deny your motion. You are quite correct as you point out in your memorandum which, by the way, was very well done, an excellent job, but you are quite correct in pointing out that Mr. O'Malley did advise you that the only substantive matter which was before this Inquiry Board was the testimony of Mr. Daley through the transcript. That is the only matter.

There is no other investigation beyond that. So he quite properly and accurately informed you of that.

I think at this point I would simply ask you since that is the only matter of substance before this Panel, would you care to have Mr. Daley make any statement or comment with regard to the circumstances under which testimony was given by Mr. Daley? That you might wish to confer with [35] Mr. Daley on, perhaps.

Mr. Martin: Well, Mr. Chairman, I think—I mean, going to the issue of additional evidence in support of my motion to exclude his testimony?

Chairman Ahern: Let me go off the record if I could for a moment.

Mr. Martin: Okay.

(Here follows a discussion off the record)

Mr. Kanter: Why don't we go back on the record?

Chairman Ahern: Okay. Let's go back on the record.

Just so the record is clear now, Mr. Martin, the Panel has overruled your motion; that is, the motion to suppress the testimony of Mr. Daley.

Mr. Martin: Yes.

Chairman Ahern: I would again ask you whether or not you wish to have Mr. Daley make any statement or comment—and of course, if you have had an opportunity to confer with him on it—to make any statement or comment with reference to the circumstances under which he did give testimony?

[36] Mr. Martin: Mr. Chairman, in light of the Panel's decision to deny the motion to exclude, that is, to exclude the use of the compelled testimony, it's our feeling that the pleadings we have heretofore filed and the exhibits adequately make a record as to the issues that have to be decided upon judicially, and so I would not ask leave at this time to supplement them.

Chairman Ahern: All right. Very well. We then will—I don't know when our next hearing will take place, but we certainly will give you ample notice of it.

Mr. Martin: Fine.

Chairman Ahern: It will be about thirty (30) days from now, and we will study the transcript in the meantime during that period of time and, hopefully, be in a position at that time to rule as this Panel—excuse me a moment.

(Here follows a discussion off the record between Mr. Scheller, Jr. and Chairman Ahern)

Chairman Ahern: All right. Then this hearing will continue then to May 14th at 2:00 o'clock. Okay. Thank you, gentlemen.

[37] Mr. Martin: Excuse me. I'm not certain this is on the record, but I wanted to make clear for purposes of proceeding with this matter in the District Court that the Panel has denied the motion and will be—will begin actually reading and reviewing the compelled testimony of Mr. Daley in the Bonk Trial.

Now, I just wanted to state that it is shown that we are really at a stage in the proceedings that is ripe to bring this to the attention of the District Court if you have decided that you will use the immunized testimony and in determining whether or not to vote a complaint, is that correct?

Chairman Ahern: That is correct as accurately stated.

Mr. Martin: All right. Thank you.

(Whereupon the hearing of this matter was continued and adjourned to May 14th, A.D. 1976, at the hour of 2:00 o'clock P.M.)

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

I, Sherwin J. Polinsky, do hereby certify that I am a court reporter doing business in the City of Chicago, County of Cook and State of Illinois, and that I reported in shorthand the proceedings had at the hearing of said cause, and that the foregoing is a true and correct transcript of my shorthand notes so taken as aforesaid and contains all of the proceedings had at said hearing.

/s/ SHERWIN J. POLINSKY

Subscribed and Sworn to before me this 10th day of April, A.D. 1976.

/s/ (Illegible)

(SEAL) *Notary Public*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1720

JOHN M. DALEY,

Petitioner,

vs

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,

Respondent.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TABLE OF CONTENTS

	PAGE
Questions Presented	1
Reasons for Not Granting the Writ	2
I. The Decision of the Court of Appeals for the Seventh Circuit, That a Disciplinary Proceeding Is Not One for "Penalty" or "Forfeiture" Within the Meaning of the Fifth Amendment's Self-Incrimination Clause, Is Not Inconsistent with the Judgments of This Court and of Another United States Court of Appeals	2
II. The Judgment Below, That the Federal Court's Authority to Protect the Integrity of Its Processes Does Not Extend to Precluding the Use of Immunized Testimony in a State Disciplinary Proceeding, Is Consistent with the Judgments of This Court and Other Courts of Appeals	5
III. The Court of Appeals, in Holding That the Order of the Trial Court Purporting to Preclude the Use of Respondent's Immunized Testimony in a State Disciplinary Proceeding Was Illegal, Has Not Violated the Due Process Clause of the Fifth Amendment	8
Conclusion	11

Table of Authorities Cited

Adams v. United States ex rel. McCann, 317 U. S. 269 (1942) 6

Boyd v. United States, 116 U. S. 616 (1886) 2, 3

Brown v. Walker, 161 U. S. 591 (1896) 2

Counselman v. Hitchcock, 142 U. S. 547 (1892) 2

Cox v. Louisiana, 379 U. S. 559 (1965) 10

In re Daley, 549 F. 2d 469 (7th Cir. 1977) ..... in passim

Erdmann v. Stevens, 458 F. 2d 1205 (2d Cir. 1972) 4, 5

Ex parte Garland, 4 Wall 333 (1867) 4

Gardner v. Broderick, 392 U. S. 273 (1968) 2

Gumbel v. Pitkin, 124 U. S. 131 (1888) 6

Huffman v. Pursue, Ltd., 420 U. S. 592 (1975) 5

Johnson v. United States, 318 U. S. 189 (1913) 8, 9

Kastigar v. U. S., 406 U. S. 441 (1972) 2

Murphy v. Waterfront Commission, 378 U. S. 52 (1964) . 2

Raley v. Ohio, 360 U. S. 423 (1959) 9, 10

Rea v. United States, 350 U. S. 214 (1956) 7, 8

In re Ruffalo, 390 U. S. 544 (1968) 4, 5

Sperry Rand Corp. v. Rothlein, 288 F. 2d 245 (2d Cir. 1961) 7

Spevack v. Klein, 385 U. S. 551 (1967) 3, 4

Ullman v. United States, 350 U. S. 442 (1956) 2

United States v. United Fruit Co., 410 F. 2d 553 (5th Cir. 1969) 7

Younger v. Harris, 401 U. S. 37 (1971) 5

Constitutional and Statutory Provisions.

United States Constitution, Amendment V ..... in passim

15 U. S. C. § 30 7

18 U. S. C. § 6002 ..... in passim

28 U. S. C. § 1651 6

28 U. S. C. § 2283 7

IN THE

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OCTOBER TERM, 1976

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JOHN M. DALEY,

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vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,

Respondent.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

QUESTIONS PRESENTED.

For the purpose of argument, Respondent will address the questions as raised by Petitioner.

REASONS FOR NOT GRANTING THE WRIT.

I.

THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT, THAT A DISCIPLINARY PROCEEDING IS NOT ONE FOR "PENALTY" OR "FORFEITURE" WITHIN THE MEANING OF THE FIFTH AMENDMENT'S SELF INCRIMINATION CLAUSE, IS NOT INCONSISTENT WITH THE JUDGMENTS OF THIS COURT AND OF ANOTHER UNITED STATES COURT OF APPEALS.

Analysis of the cases referred to by Petitioner reveals that the decision of the Court of Appeals in this matter is consistent with prior decisions of this Court and other Courts of Appeals, as well as with the overwhelming weight of state authority.

By his reference to *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892) (*Petition*, p. 8), Petitioner ignores, as he has throughout the proceedings below, the later decisions of this Court which have greatly limited the "penalty and forfeiture" concept of the privilege against self-incrimination. *Brown* v. *Walker*, 161 U. S. 591 (1896), *Ullman* v. *United States*, 350 U. S. 442 (1956). *Murphy* v. *Waterfront Commission of New York*, 378 U. S. 52 (1964), *Gardner* v. *Broderick*, 392 U. S. 273 (1968). It was in response to *Brown*, *Ullman*, *Murphy*, and *Gardner*, that Congress in 1970 enacted the Immunity Act, 18 U. S. C. § 6002, which affords immunity from the use of compelled testimony "in any criminal case." In *Kastigar* v. *United States*, 406 U. S. 441 (1972), this Court upheld the provisions of 18 U. S. C. § 6002 as being coextensive with the protection afforded by the privilege.

Petitioner relies upon *Boyd* v. *United States*, 116 U. S. 616 (1886) in support of his contention that the privilege against self-incrimination precludes the use of compelled testimony

against the witness in subsequent cases involving penalties and forfeitures. Petitioner's reliance upon *Boyd* is not well founded.

Boyd involved the compulsory production of books and records in a suit for the forfeiture of property alleged to have been imported without payment of import taxes as required by statute. The statute provided for criminal penalties (fine and imprisonment) and for the forfeiture of the imported merchandise. The prosecutor waived indictment and sought only the forfeiture of the goods. This Court held that a case in which the issue was whether the criminal statute had been violated is a criminal case for the purpose of invoking the privilege against self-incrimination.

The Court below recognized the difference between the instant matter and the situation as it existed in *Boyd:*

> . . . [A] "criminal case," for the purpose of the invocation of the Fifth Amendment privilege is one which may result in sanctions being imposed upon a person *as a result of his conduct being adjudged violative of the criminal law.*
>
> The essence of state bar disciplinary proceedings, however, is not a resolution regarding the alleged criminality of a person's act, but rather a determination of the moral fitness of an attorney to continue in the practice of law. Although conduct which could form the basis for a criminal prosecution might also underline the institution of disciplinary proceedings, the focus is upon gauging an individual's character and fitness, and not upon adjudging the criminality of his prior acts or inflicting punishment for them. *In re John M. Daley*, 549 F. 2d 469 at 474. (Emphasis added.)

Petitioner's reliance upon *Spevack* v. *Klein*, 385 U. S. 511 (1967) is likewise misplaced. In *Spevack*, this Court held that an attorney may assert the privilege against self-incrimination in response to questions asked in a disciplinary proceeding and he may not be disbarred or otherwise punished for doing so. This Court stated, "Lawyers are not excepted from the words

'No person . . . shall be compelled *in any criminal case* to be a witness against himself.' " *Spevack* v. *Klein*, 385 U. S. at p.516. (Emphasis added.) Accord with the decision below in this case, rather than discord, is apparent.

Petitioner calls this Court's attention to *Ex parte Garland*, 4 Wall 333 (1867) and *In re Ruffalo*, 390 U. S. 544 (1968), as being instances of this Court's willingness to characterize the discipline of an attorney as being "punishment" or "a penalty."

Respondent agrees that the imposition of discipline on a given attorney may have the effect of working a hardship. However, the Court below pointed out that for Fifth Amendment purposes, the focus of inquiry should be upon the nature rather than the effect of the proceeding:

> Thus, a clear distinction exists between proceedings whose essence is penal, intended to redress criminal wrongs by imposing sentences of imprisonment, other types of detention or commitment, or fines, and proceedings whose purpose is remedial, intended to protect the integrity of the courts and to safeguard the interests of the public by assuring the continued fitness of attorneys licensed by the jurisdiction to practice law. The former type of proceeding is in actuality "criminal" in nature and therefore within the ambit of the Fifth Amendment safeguards against self-incrimination; the latter is not. *In re Daley, supra*, at p. 475.

In re Ruffalo, supra, did not involve any issue concerning the application of the privilege against self-incrimination. Rather, the Court held that due process requires that an attorney be given notice of the charge and an opportunity to defend prior to discipline being imposed. Significantly, the Court commented, "Such procedural violation of due process would never pass muster in any normal civil or criminal litigation." *In re Ruffalo*, 390 U. S. at 550-551.

Finally, Petitioner points to *Erdmann* v. *Stevens*, 458 F. 2d 1205 (2d Cir. 1972), a decision he believes to be inconsistent with the decision of the Court of Appeals in this case. Like

Ruffalo, supra, the *Erdmann* case does not involve any question of the application or scope of the privilege against self-incrimination. Rather, in *Erdmann*, the Court of Appeals sought to apply the non-intervention doctrine of *Younger* v. *Harris*, 401 U. S. 37 (1971), which held that the federal courts should not intervene in pending state criminal prosecutions absent a certain showing of bad faith. In order to bring the disciplinary proceeding involved in *Erdmann* within the mandate of *Younger*, the *Erdmann* Court found it necessary to construe disciplinary proceedings as being "comparable to a criminal rather than a civil proceeding." *Erdmann* v. *Stevens*, 458 F. 2d at p. 1209.

Significantly, in *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975), this Court extended the principle enunciated in *Younger* to questions of federal intervention in state civil proceedings as well, thereby eliminating the need for such tortuous reasoning as is found in *Erdmann* v. *Stevens, supra.*

The judgment of the Court of Appeals for the Seventh Circuit is not in conflict with any decision of this Court or of any Court of Appeals. All the cases, both federal and state, which have considered the question, conclude that an attorney disciplinary proceeding is not a "criminal case" within the purview of the privilege against self-incrimination or 18 U. S. C. § 6002.

II.

THE JUDGMENT BELOW, THAT THE FEDERAL COURT'S AUTHORITY TO PROTECT THE INTEGRITY OF ITS PROCESSES DOES NOT EXTEND TO PRECLUDING THE USE OF IMMUNIZED TESTIMONY IN A STATE DISCIPLINARY PROCEEDING, IS CONSISTENT WITH THE JUDGMENTS OF THIS COURT AND OTHER COURTS OF APPEALS.

Petitioner is mistaken in asserting that the Court of Appeals rejected *sub silentio* his argument that the federal courts possess inherent equitable powers over their own processes to prevent abuse. Rather, the Court of Appeals specifically acknowledged

that power but held that an immunity order issued pursuant to 18 U. S. C. § 6003 is not a matter of judicial process or discretion except in a ministerial sense. The immunity power originates in the legislature and its exercise is delegated solely to the executive, *In re Daley*, 549 F. 2d at p. 479. The Court below further pointed out that Congress has equipped the federal prosecutor with potent tools, a prosecution for perjury or for contempt, which he may wield in assuring the integrity of the testimony compelled. *In re Daley*, 549 F. 2d at p. 480.

Nevertheless, Respondent persists in suggesting that federal courts possess concurrent authority with the executive to concern themselves with such matters. Petitioner relies first on the All Writs Act, 28 U. S. C. § 1651, a codification of the federal court's long recognized power to issue writs which may be necessary and appropriate for the exercise of their respective jurisdictions.

This Court, however, has delineated the role and function of the prerogative writs as codified by 28 U. S. C. § 1651. The Court stated:

> *Unless appropriately confined by Congress*, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269 at p. 273 (1942). (Emphasis added.)

Respondent suggests that the mandate of 18 U. S. C. § 6002 —that no testimony compelled under a grant of immunity may be used against the witness "in any criminal case"—constitutes appropriate confinement by Congress.

Consideration of the four remaining authorities referred to by Petitioner reveals no inconsistency with the decision of the Court below in this matter.

Gumbel v. *Pitkin*, 124 U. S. 131 (1888), only affirmed the equitable power of the federal court to redress injuries occa-

sioned by the abuse of its own process. A federal marshal, through service of an invalid writ of attachment, had improperly taken property into custody, preventing service of an otherwise proper writ of attachment issued by a state court. This Court directed that the aggrieved party be given proper priority in the distribution of proceeds resulting from the sale of the property.

In *Sperry Rand Corp.* v. *Rothlein*, 288 F. 2d 245 (2d Circuit, 1961) the Court of Appeals affirmed the district court's injunction against Sperry Rand from using information obtained through discovery in a suit in a federal court against the same defendant in a similar suit in a state court. In the federal case, the district court established a schedule of discovery and Sperry Rand was afforded priority. Sperry Rand sought to obtain advantage by using the federal discovery material in the state proceeding. It is significant, in light of the issue presented in this case, that before affirming the injunction against Sperry Rand, the Court of Appeals first concluded that to do so would not contravene the mandate of 28 U. S. C. § 2283 (The Anti-Injunction Statute) by staying a state proceeding.

In *United States* v. *United Fruit Co.*, 410 F. 2d 553 (5th Circuit, 1969), the Court of Appeals affirmed the district court's denial of a motion by a competitor of United Fruit to allow the competitor to inspect divestiture plans filed by United Fruit pursuant to a final consent judgment entered in a civil anti-trust suit against United Fruit. The competitor was not a party to the anti-trust suit. The divestiture plans were the subject of a protective order issued pursuant to F. R. C. P. 30(b) which provided that third parties could not without express order inspect documents filed with the court. The only issue presented on appeal, material to this case, was whether the order contravened the provisions of the Publicity in Taking Evidence Act (15 U. S. C. § 30). The court concluded that it did not.

Finally, in *Rea* v. *United States*, 350 U. S. 214, 76 S. Ct. 292, 100 L. Ed. 233 (1956), this Court exercised its supervisory

power over federal law enforcement agencies. The Court enjoined a federal agent who sought to avoid the effect of Rule 41(a) of the Federal Rules of Criminal Procedure by testifying in a state criminal proceeding about an illegal search. This court enjoined the agent "merely to enforce the federal Rules against those owing obedience to them." *Rea* v. *United States*, 350 U. S. at 217.

The cases referred to by Petitioner stand only for the proposition that the federal courts may issue orders in aid of valid jurisdiction. They do not provide the courts with an independent source of power whereby otherwise unauthorized acts might be validated. They are not inconsistent with the decision of the Court below.

III.

THE COURT OF APPEALS, IN HOLDING THAT THE ORDER OF THE TRIAL COURT PURPORTING TO PRECLUDE THE USE OF RESPONDENT'S IMMUNIZED TESTIMONY IN A STATE DISCIPLINARY PROCEEDING WAS ILLEGAL, HAS NOT VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The Court below found that the United States Attorney acted outside the scope of his jurisdiction by exceeding the authority delegated to him. *In re Daley, supra* at p. 480. Petitioner nevertheless contends that for the "government" to turn its back on "its commitments" is a denial of elementary fairness. (*Petition*, p. 14). The cases referred to by Respondent do not support his contention that the exercise of the legitimate and independent power of the Illinois Supreme Court should be barred because of "the word of the United States and the word of a United States District Court" (*Petition*, p. 14), however erroneous.

Appellee relies on *Johnson* v. *U. S.*, 318 U. S. 189, 63 S. Ct. 548, 87 L. Ed. 704 (1943). In *Johnson*, the Court held that as it is improper for the prosecutor to comment on the silence of a defendant in a criminal case, it is also improper for the prosecutor to comment to the jury on a witness' assertion of the privilege against self-incrimination.

In *Johnson*, the defendant in a criminal case took the stand in his own defense and was allowed by the trial court to assert the privilege against self-incrimination in response to certain questions asked during cross-examination. As a collateral matter this Court pointed out, that it would not have been error for the trial court to deny petitioner's claim of privilege, *Johnson* v. *U. S.*, 318 U. S. at 196. By taking the stand, the Court held, the defendant waived the privilege as to all relevant matters. However, whether the privilege was properly afforded or not, once it was granted, the defendant's decision to claim it might have been different had he known it would be submitted to the jury as evidence. The prejudice did not occur when the court erred in allowing the defendant to claim the privilege. The prejudice resulted when the court allowed his claim of the privilege to be submitted to the jury in argument. The court stated, "The fact that the *privilege* is mistakenly granted is immaterial", *Johnson* v. *U. S.*, 318 U. S. at 197. (Emphasis added.)

Raley v. *Ohio*, 360 U. S. 423, 70 S. Ct. 1257, 3 L. Ed. 2d 1344 (1959), involved the testimony of certain witnesses before the Ohio Un-American Activities Commission. At the time they testified, the witnesses were unaware of an Ohio statute which *automatically* granted immunity to any person appearing before a legislative committee. During their testimony, the witnesses on several occasions claimed the privilege against self-incrimination and they were informed by the Commission that they had a right to do so. At no time were they advised of the existence of the immunity statute or that the privilege against self-incrimination was not available to them. As a result of claiming the privilege, they were convicted of contempt for failing to answer questions before the Commission.

The Ohio Supreme Court affirmed the convictions. This Court reversed, stating: "Since the defendants were apprised by the Commission at the time they were testifying that they

had a right to refuse to answer questions which might incriminate them, they could not possibly in following the admonition of the commission be in contempt of it." *Raley* v. *Ohio*, 360 U. S. at 426.

In *Cox* v. *Louisiana*, 379 U. S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965), Cox had been convicted for parading "in or near" a courthouse in violation of a Louisiana statute. In reversing the conviction, this Court held that the statute was valid on its face, but suggested that "the statute, with respect to the determination of how near the courthouse a particular demonstration can be, foresees a degree of on-the-spot administrative interpretation by officials charged with responsibility for administering and enforcing it." *Cox* v. *Louisiana*, 379 U. S. at p. 568. In leading the demonstration which resulted in his conviction, Cox relied upon the representation of officials who were present that the demonstration could be properly conducted across the street from the courthouse.

Citing *Raley* v. *Ohio* (*supra*), this Court held, "As in *Raley*, under all the circumstances of this case, after public officials acted as they did, to sustain appellant's later conviction for demonstrating where they told him he could 'would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him.' The Due Process Clause does not permit convictions to be obtained under such circumstances." *Cox* v. *Louisiana*, 379 U. S. at 571.

The aforementioned decisions significantly differ from the situation in this case and are not inconsistent with the decision of the Court below in any way. The "indefensible sort of entrapment" found in *Raley* and *Cox* was the attempt by Ohio and Louisiana, respectively, to obtain an advantage as a result of their own misleading acts.

CONCLUSION.

The Court of Appeals held in this matter that neither the privilege against self-incrimination nor 18 U. S. C. § 6002 precludes the use of immunized testimony as evidence in a state disciplinary proceeding. The Court of Appeals correctly held that a disciplinary proceeding is not a "criminal case" within the purview of the Fifth Amendment. Further, the Court of Appeals held that the federal court's equitable power to protect the integrity of its own processes cannot justify an order restraining a state from exercising its independent and proper jurisdiction.

The decision of the Court of Appeals in this matter is in accord with the decisions of this Court construing the scope of the privilege against self-incrimination and it is not inconsistent with the decision of any other Court of Appeals. For these reasons, Respondent prays that this Court deny the issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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